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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1969

THE LAIDLAW CORPORATION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## APPENDIX

ALLEN W. TEAGLE,
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ROBERT M. LIEBER,
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San Francisco, California 94105,
*Attorneys for Petitioner.*

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593 Market Street,
San Francisco, California 94105,
*Of Counsel.*

No. 17,033

IN THE

# United States Court of Appeals

FOR THE SEVENTH CIRCUIT

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THE LAIDLAW CORPORATION,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

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On Petition To Review And On Cross-Application For Enforcement Of An Order Of The National Labor Relations Board

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## APPENDIX

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*Petitioner herein; Respondent before the Board.

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* Petitioner herein; Respondent before the Board.

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION TWENTY-FIVE**

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* * * (Caption Case No. 25-CA-2399) * * *

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## COMPLAINT AND NOTICE OF HEARING

It having been charged by Local 681 International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO, that the Laidlaw Corporation, herein called Respondent, have engaged in, and are engaging, in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Twenty-Fifth Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations - Series 8, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. (a) The original charge, was filed by the Union on December 13, 1965, and served on Respondent by registered mail on or about December 13, 1965.

(b) An amended charge was filed by the Union on January 14, 1966 and served on Respondent by registered mail on or about January 17, 1966.

(c) A second amended charge was filed by the Union on January 27, 1966 and served on Respondent by registered mail on or about January 28, 1966.

2. (a) Respondent is and has been at all times material herein a corporation duly organized and existing by virtue of the laws of the State of Indiana.

(b) At all times material herein, Respondent has maintained its principal office and place of business in the city of Peru, State of Indiana, herein called the Peru plant, and various other plants and places of business, ware-

houses, and other facilities in Indiana and other states of the United States, and is, and has been at all times material herein, engaged at said Peru plant and elsewhere in the manufacture, sale, and distribution of wire and related products. The Respondents Peru Plant is the only plant involved in this proceeding.

(c) Respondent, during the past twelve months, which period is representative of all times material herein, manufactured, sold, and shipped from its Peru Plant, finished products valued in excess of $50,000 to points outside Indiana.

(d) During the past twelve months, which period is representative of all times material herein, Respondent in the course and conduct of its business operations, purchased, transferred, and delivered to its Peru Plant, goods and materials, valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported to said Peru plant directly from States of the United States other than the State of Indiana.

(e) Respondent is and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. International Brotherhood of Pulp Sulphite and Paper Mill Workers, AFL-CIO and its local 681, herein referred to as The Union each are, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

4. At all times material herein the following named persons occupied the positions set opposite their name and have been and are now agents of Respondent at its Peru plant, acting on its behalf and are supervisors within the meaning of Section 2(11) of the Act.

| | |
|---|---|
| John Johnston | Plant Manager |
| Leonard Krile | Foreman |
| Elza Buttram | Foreman |

5. Since on or about June 13, 1965, and continuing to date, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, its employees in the exercise of rights guaranteed in Section 7 of the Act, by the following acts and conduct:

(a) By the agents and on or about the dates set forth below Respondent in and about its Peru plant threatened to discontinue the employment of its employees if they participated in a strike and particularly if they participated in the strike described in paragraph 7 hereof.

| | |
|---|---|
| John Johnston | January 11, 1966 |
| Leonard Krile | January 10, 1966 |
| Elza Buttram | January 12, 1966 |

(b) Since on or about June 13, 1965 the Employer has maintained and enforced a no distribution rule whereby it barred and prevented employees from distributing or circulating petitions or printed matter of any kind on any part or portion of the premises of the Peru plant at any time.

(c) By the agents and on or about the dates set forth below in and about its Peru plant Respondent interrogated employees concerning their Union sympathies and allegiances and the Unions plans and intentions.

| | |
|---|---|
| John Johnston | December 7, 1965 |
| Leonard Krile | January 10, 1966 |
| Elza Buttram | January 10, 1966 |

6. (a) On or about December 7, 1966, Respondent did discharge Carmon Brown an employee of said Respondent at its Peru plant.

(b) Since the date of discharge referred to above in paragraph 6(a), Respondent has failed and refused, and continues to fail and refuse, to reinstate, recall or rehire Carmon Brown in his former or substantially equivalent position or any other position of employment.

(c) Respondent engaged in the conduct set forth in paragraphs 6(a) and (b) because Carmon Brown was the vice-president and principal bargainer for the Union and because he joined and assisted the Union and engaged in other Union activity and concerted activities for the purpose of collective bargaining or mutual aid or protection.

7. (a) On or about January 12, 1966, certain employees of Respondent employed at the Peru plant ceased work concertedly and went out on strike, and since that date have engaged, and are engaged, in such concerted work stoppage and strike.

(b) The strike described above in paragraph 7(a) was caused and prolonged by the unfair labor practices described above and below in paragraph 8.

8. (a) All production and maintenance employees at the Employer's Peru, Indiana operation, exclusive of all office clerical employees and all guards and professional employees, and all supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

(b) On or about June 7, 1962, majority of the employees of Respondent in the unit described above in paragraph 8(a), by a secret ballot election conducted under the supervision of the Regional Director for the Twenty-Fifth Region of the National Labor Relations Board, designated and selected the Union as their representative for the purposes of collective bargaining with Respondent, and on or about June 15, 1962, said Regional Director certified the Union as the exclusive collective-bargaining representative of the employees in said unit.

(c) At all times since June 7, 1962, and continuing to date, the Union has been the representative for the purposes of collective bargaining of the employees in the unit described above in paragraph 8(a), and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(d) Commencing on or about October 1, 1965, and continuing to date, and more particularly on October 1, November 22, December 17, 1965, and January 7 and various dates after in 1966, the Union has requested, and is requesting, Respondent to bargain collectively with respect to wages, as the exclusive collective-bargaining representative of all the employees of Respondent in the unit described above in paragraph 8(a).

(e) Commencing on or about December 1, 1965, and at all times thereafter, Respondent did refuse, and continues to refuse, to bargain collectively with the Union as the exclusive collective-bargaining representative of all the

employees in the unit described above in paragraph 8(a), in that

(i) Commencing on or about January 7, 1966, and at all times thereafter, it refused to bargain on the subject of wages

(ii) Commencing on and after January 7, 1966, it knowingly made unacceptable contract proposals in purported negotiations for the purpose and with the intentions of preventing agreement and avoiding and evading its obligation to bargain with the Union

(iii) It engaged in the conduct set forth in paragraphs 5 and 6 in order to undermine the Union, destroy its majority, and render it less capable and/or incapable of bargaining.

9. By the acts described above in paragraphs 5 through 8, and by each of said acts, Respondent did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2 (6) and (7) of the Act.

10. By the acts described above in paragraph 6, and by each of said acts, Respondent did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

11. By the acts described above in paragraphs 5, 6, and 8, and by each of said acts, Respondent did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

12. The acts of Respondent described in paragraphs 5 through 11, above, occurring in connection with the operations of Respondent described in paragraph 2 above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

13. The acts of Respondent described above constitute unfair labor practices affecting commerce within the mean-

ing of Section 8(a)(1), (3) and (5), and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 28th day of March, 1966, at GAR Room, First Floor, Miami County Courthouse, Peru, Indiana, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

DATED AT Indianapolis, Indiana, this 28th day of February, 1966.

/s/ Wm. T. Little, Regional Director
National Labor Relations Board
Region Twenty-five
Sixth Floor, ISTA Center
150 West Market Street
Indianapolis, Indiana 46204

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION TWENTY-FIVE**

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* * * (Caption Case No. 25-CA-2399) * * *

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## RESPONDENT'S ANSWER TO COMPLAINT

Comes now respondent, The Laidlaw Corporation, and for answer to the Complaint of the General Counsel, of and on behalf of the National Labor Relations Board, alleges and states as follows:

1. The respondent admits the allegations of subparagraphs (a), (b) and (c) of rhetorical paragraph 1 of the Complaint.

2. Respondent admits the allegations of subparagraph (a) of rhetorical paragraph 2 of the Complaint.

The respondent, with respect to the allegations of subparagraph (b) of rhetorical paragraph 2 of the Complaint, admits that at all times material to the Complaint it has maintained its principal office and place of business in the City of Peru, State of Indiana; however, respondent denies that it has other plants and places of business, warehouses and other facilities in Indiana and other states of the United States, except that respondent maintains a sales office in the City of Chicago, in the State of Illinois. Respondent admits that at all times material to the Complaint it has been engaged at its Peru plant only in the manufacture, sale and distribution of wire products and related products.

The respondent admits the allegations of subparagraph (c) of rhetorical paragraph 2 of the Complaint.

The respondent has no knowledge at this time and, therefore, neither admits or denies the allegations of subparagraph (d) of rhetorical paragraph 2 of the Complaint.

The respondent admits the allegations of subparagraph (e) of rhetorical paragraph 2 of the Complaint.

3. The respondent admits the allegations of rhetorical paragraph 3 of the Complaint.

4. The respondent admits, with respect to the allegations of rhetorical paragraph 4 of the Complaint, that at all times material to the Complaint John Johnston occupied the position of Plant Manager, Leonard Krile occupied the position of Foreman, and Elza Buttram occupied the position of Foreman, and that all were at such times supervisors of respondent at its Peru plant within the meaning of Section 2(11) of the Act; but respondent denies the remaining allegations of said rhetorical paragraph 4.

5. Respondent denies all of the allegations of rhetorical paragraph 5 of the Complaint, including all of the allegations of subparagraphs (a), (b) and (c) thereof.

6. Concerning the allegations of rhetorical paragraph 6 of the Complaint, respondent admits the allegations of subparagraphs (a) and (b) of said rhetorical paragraph 6, but denies the allegations of subparagraph (c) of said rhetorical paragraph 6 of the Complaint.

7. Concerning the allegations of rhetorical paragraph 7 of the Complaint, respondent admits the allegations of subparagraph (a), but denies the allegations of subparagraph (b) of said rhetorical paragraph 7 of the Complaint.

8. Concerning the allegations of rhetorical paragraph 8 of the Complaint, respondent admits the allegations of subparagraphs (a) (b) and (c), and concerning the allegations of subparagraph (d) respondent admits that on October 1 and on November 22, 1965, the Union requested the Company to bargain with respect to wages on December 17, 1965, and that on December 17, 1965, the Union requested the Company to bargain with respect to wages on January 7, 1965; but respondent denies the remaining allegations of subparagraph (d) of said rhetorical paragraph 8 of the Complaint.

Respondent, further, denies all of the allegations of subparagraph (e) of rhetorical paragraph 8 of the Complaint, including the allegations of sub-subparagraphs (i), (ii) and (iii) thereof.

9. Respondent denies the allegations of rhetorical paragraph 9 of the Complaint.

10. Respondent denies the allegations of rhetorical paragraph 10 of the Complaint.

11. Respondent denies the allegations of rhetorical paragraph 11 of the Complaint.

12. Respondent denies the allegations of rhetorical paragraph 12 of the Complaint.

13. Respondent denies the allegations of rhetorical paragraph 13 of the Complaint.

Dated at Indianapolis, Indiana, this 11th day of March, 1966.

CADICK, BURNS, DUCK & NEIGHBOURS
By /s/ D. C. DUCK
Attorneys for Respondent,
The Laidlaw Corporation
800 Union Federal Building
45 North Pennsylvania Street
Indianapolis, Indiana 46204

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION TWENTY-FIVE**

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* * * (Caption Case No. 25-CA-2450) * * *

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## COMPLAINT AND NOTICE OF HEARING

It having been charged by International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO, herein called the Union, that The Laidlaw Corporation, herein called Respondent, has engaged in, and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Twenty-fifth Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations - Series 8, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. (a) The original charge was filed by the Union on February 23, 1966, and served on Respondent by registered mail on or about February 25, 1966.

(b) An amended charge was filed by the Union on March 23, 1966, and served on Respondent by registered mail on or about March 23, 1966.

2. (a) Respondent is and has been at all times material herein a corporation duly organized and existing by virtue of the laws of the State of Indiana.

(b) At all times material herein, Respondent has maintained its principal office and place of business in the City of Peru, State of Indiana, herein called the Peru plant, and is, and has been at all times material herein, engaged at said Peru plant in the manufacture, sale, and distribution of wire and related products. The Respondent's Peru Plant is the only plant involved in this proceeding.

(c) Respondent, during the past twelve months, which period is representative of all times material herein,

manufactured, sold, and shipped from its Peru Plant, finished products valued in excess of $50,000 to points out-Indiana.

(d) Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

4. At all times material herein, the following named persons occupied the positions set opposite their name and have been and are now agents of Respondent at its Peru plant, acting on its behalf and are supervisors within the meaning of Section 2(11) of the Act.

| | |
|---|---|
| Frances J. Bookwalter | — Office Manager |
| "Bud" Gallager | — Director of Production |
| John Johnston | — Plant Manager |
| Bobby C. Bridges | — Foreman |
| C. Hurry | — Employment Manager |

5. (a) The Respondent did terminate the following employees employed at the Peru, Indiana, plant on or about the dates set opposite their names

| | |
|---|---|
| William Massey | January 16 or 18, 1966 |
| Eva Whitaker | February 18, 1966 |

(b) Since the dates of termination named above in paragraph 5(a), the Respondent has failed and refused, and continues to fail and refuse, to reinstate or reemploy said employees to their former or substantially equivalent positions of employment because they participated in the strike described in paragraph 6(a).

(c) The Respondent did terminate and failed and refused and continues to fail and refuse to reinstate or reemploy the employees referred to and/or named above in paragraphs 5(a) and (b), because said employees joined and assisted the Union and engaged in other union activity and concerted activities for the purpose of collective bargaining and mutual aid or protection and because of the Respondent's belief that the said employees assisted the Union or engaged in other union activity or concerted activities.

6. (a) On or about January 12, 1966, the employees of Respondent named in Schedule "A", annexed hereto and made a part hereof, employed at the Peru plant ceased work concertedly and went out on strike.

(b) The strike described above in paragraph 6(a) was caused and prolonged by the unfair labor practices described above and below in paragraphs 5, 6, 8, 9, 10, 11, 12 and 13, and the unfair labor practice described in paragraphs 5 and 8 in the Complaint issued in Case No. 25-CA-2399.

(c) On or about February 11, 1966, the employees who engaged in the strike or other concerted activities referred to above in paragraph 6(a) made an unconditional offer through the Union to return to their former or substantially equivalent positions of employment, and on February 11, 14, 15 and 17, 1966, said employees made individual unconditional offers to return to their former or substantially equivalent positions of employment.

(d) On or about February 11, 14, 15 and 16, 1966, and at all times since, the Respondent has failed and refused, and continues to fail and refuse, to reinstate or reemploy the employees referred to above in paragraph 6(a) to their former or substantially equivalent positions of employment, except those named below who were offered reinstatement or reemployment on the date set opposite their name below.

| | |
|---|---|
| Susan Dodge | February 15, 1966 |
| Maria Lemasters | February 15, 1966 |
| Hildred Lemke | February 15, 1966 |
| Kenneth Miller | February 14, 1966 |
| Shirley Roberts | February 15, 1966 |
| Joyce Shultz | February 15, 1966 |
| Harold Stone | February 14, 1966 |
| Shirley Garner | February 15, 1966 |
| Ida Gochenaur | February 19, 1966 |
| Elsie Goughenour | February 21, 1966 |
| Antoinette Loe | February 21, 1966 |
| Mavis Noble | February 21, 1966 |
| Helen Phillipy | February 19, 1966 |
| Myra Ridenour | February 19, 1966 |
| Marilyn Stapelton | February 21, 1966 |

(e) On or about February 11 and 16, 1966, the Respondent notified the employees referred to above in paragraph 6(a) that their employment status with the Respondent was terminated.

(f) On or about February 25, 1966, the Respondent notified the employees referred to above in paragraph 6(a) that their group insurance carried by the Respondent was being terminated.

(g) The Respondent did fail and refuse and continues to fail and refuse to reinstate the employees referred to above in paragraph 6(a) and engaged in the conduct described above in paragraphs 6(e) and (f) for the reason that said employees had joined and assisted the Union and engaged in other concerted activities for the purpose of collective bargaining or mutual aid or protection and had participated in the strike described above.

(h) On or about February 21 and 22, 1966, the employees named in paragraph 6(d), to whom the Respondent offered reemployment, ceased or refused to work concertedly and went out on strike and since the date have engaged and are engaged in such concerted work stoppage and strike.

(i) The strike described above in paragraph 6(h) was caused and prolonged by the unfair labor practice described above and below in paragraphs 5, 6 and 8.

7. (a) All production and maintenance employees at the Employer's Peru, Indiana operation, exclusive of all office clerical employees and all guards and professional employees, and all supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

(b) On or about June 7, 1962, a majority of the employees of Respondent in the unit described above in paragraph 7(a), by a secret ballot election conducted under the supervision of the Regional Director for the Twenty-fifth Region of the National Labor Relations Board, designated and selected the Union as their representative for the purposes of collective bargaining with Respondent, and on or about June 15, 1962, said Regional Director certified the Union as the exclusive collective bargaining representative of the employees in said unit.

(c) At all times since June 7, 1962, and continuing to date, the Union has been the representative for the purposes of collective bargaining of the employees in the unit described above in paragraph 7(a), and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(d) On or about December 14, 1964, the Respondent and the Union executed, and have since that date maintained in effect, a collective bargaining agreement relating to wages, hours, and conditions of employment of the Respondent's employees in the unit described above in paragraph 7(a).

8. (a) Commencing on or about October 1, 1965, and continuing to date, and more particularly on October 1, November 22, December 17, 1965, and January 7 and various dates after in 1966, the Union has requested, and is requesting Respondent to bargain collectively with respect to wages as the exclusive collective bargaining representative of all the employees of Respondent in the unit described above in paragraph 7(a).

(b) Commencing on or about December 1, 1965, and at all times thereafter, Respondent did refuse, and continues to refuse, to bargain collectively with the Union as the exclusive collective bargaining representative of all the employees in the unit described above in paragraph 7(a), in that

(i) Commencing on or about January 7, 1966, and at all times thereafter, it refused to bargain on the subject of wages.

(ii) Commencing on and after January 7, 1966, it knowingly made unacceptable contract proposals in purported negotiations for the purpose and with the intention of preventing agreement and avoiding and evading its obligation to bargain with the Union.

(iii) Commencing on and after January 11, 1966, it changed the hiring rate of unskilled female employees from $1.395 per hour to $1.495 per hour, thereby (a)

unilaterally altering wages, hours, and conditions of employment, (b) modifying its collective bargaining agreement with the Union without notice to the Union as required by Section 8(d) of the Act, and (c) offering a higher rate of pay to individual employees than it offered to the Union during the purported negotiations with the Union on and after January 7, 1966.

(iv) On or about February 8, 1966, and on March 4, 1966, and at all times since, the Union has requested the Respondent to furnish to the Union data relating to the names of employees, seniority, job classifications, group insurance of employees and related matters, and the Respondent has refused to furnish said data.

(v) On or about January 11, 1966, and at all times since, Respondent has offered strikers and applicants for employment premium pay to cease striking and return to work.

(vi) It engaged in the conduct set forth in paragraphs 5, 6 and 8, above and in conduct set forth in paragraphs 5, 6, and 8 in the Complaint in Case No. 25-CA-2599 in order to undermine the Union, destroy its majority and render it less capable and/or incapable of bargaining.

9. By the acts described in paragraphs 5 through 8, and by each of said acts, Respondent did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

10. By the acts described above in paragraphs 5 and 6, and by each of said acts, Respondent did engage in, and is engaging in, unfair practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

11. By the acts described above in paragraphs 5, 6, and 8, and by each of said acts, Respondent did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

12. The acts of Respondent described in paragraphs 5 through 11, above, occurring in connection with the operations of Respondent described in paragraph 2, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

13. The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3) and (5) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 5th day of April, 1966, at GAR Room, First Floor, Miami County Courthouse, Peru, Indiana, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

DATED AT Indianapolis, Indiana, this 23rd day of March, 1966.

/s/ Wm. T. Little, Regional Director
NATIONAL LABOR
RELATIONS BOARD
Region 25
Sixth Floor, ISTA Center
150 West Market Street
Indianapolis, Indiana 46204

## SCHEDULE A

Richard Achey
Steven Achey
Diana Bakke
Mary Barnhill
Norma Black
Clara Blackman
Polly Bowman
Rhea Bowman
Myra J. (Michael) Bowman
Christine Brown
Lyle Brown
Nanola Browning
Dorothy Cain
Dewey Cole
Larry Condon
Ronny Craw
Betty Crippen
Martha Dalton
Susan Dodge
Virginia Durham
Dovie Fisher
Inge Fincle
Marjorie Flitcraft
Shirley Garner
Mildred Glaze
Ida Gochenaur
Janice Goll
Garnet Good
Elsie Goughenour
Dorothy Graham
Mary Green
Bobetta Harter
Elmer Hiers
Thelma Hiers
Gertrude Hight
Elsie Hostetler
Betty Houk
Nellie Hughes
Marjorie Johnson
Risa Johnson
Marilyn D. Jones
Betty Kline
Janet Lampkin
Lavone Landis
Maria Lemasters
Lawrence Lamons
Hildred Lemke
Mary Lepkojus
Antoinette Loe
William Massey
Etwinda Matlock
Kenneth Miller
Patricia Miller
Marie Nichols
Mavis Noble
Roanen Nunn
Eiko Oldham
Kathleen Ousley
Bertha Parham
Rozena Patterson
Helen Phillipy
Margaret Pierce
Myra Ridenour
Shirley Roberts
Wanda Rose
Lynn Schofield
Dorothy Scotten
Joyce Shultz
Lois Snow
Marilyn Stapleton
Harold Stone
Patricia Viertal
Earlene Watson
Monnie Wellman
Eva Whitaker
Catherine Wolfe
Alexander Zelinsky

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION TWENTY-FIVE**

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* * * (Caption Case No. 21-CA-2450) * * *

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## RESPONDENT'S ANSWER TO COMPLAINT

Comes now Respondent, The Laidlaw Corporation, and for answer to the Complaint of the General Counsel, of and on behalf of the National Labor Relations Board, alleges and states as follows:

1. Respondent admits the allegations of sub-paragraphs (a) and (b) of rhetorical paragraph 1 of the Complaint.

2. Respondent admits the allegations of sub-paragraphs (a), (b), (c) and (d) of rhetorical paragraph 2 of the Complaint.

3. Respondent admits the allegations of rhetorical paragraph 3 of the Complaint.

4. Respondent admits with respect to the allegations of rhetorical paragraph 4 of the Complaint that at all times material to the Complaint Frances J. Bookwalter occupied the position of Office Manager, "Bud" Gallager occupied the position of Director of Production, John Johnston occupied the position of Plant Manager, and C. Hurry occupied the position of Employment Manager, and that Francis J. Bookwalter, "Bud" Gallager, John Johnson, and C. Hurry were at such times supervisors of Respondent at its Peru plant within the meaning of Section 2(11) of the Act. Respondent denies the remaining allegations of rhetorical paragraph 4 of the Complaint.

5. Respondent admits the allegations contained in sub-paragraph (a) of rhetorical paragraphs 5 of the Complaint. Respondent admits so much of sub-paragraph (b) of rhetorical paragraph 5 of the Complaint as alleges that "Since

the dates of termination named above in paragraph 5(a), the Respondent has failed and refused, and continues to fail and refuse, to reinstate or reemploy said employees to their former or substantially equivalent positions of employment"; but Respondent denies the remaining allegations of sub-paragraph (b) of rhetorical paragraph 5 of the Complaint. Respondent denies the allegations of sub-paragraph (c) of rhetorical paragraph 5 of the Complaint.

6. Respondent denies the allegations of sub-paragraphs (a), (b), (c), (e), (f), (g) and (i) of rhetorical paragraph 6 of the Complaint. Respondent admits that Respondent offered reinstatement to the following employees on the following dates:

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|---|---|
| Susan Dodge | February 15, 1966 |
| Maria Lemasters | February 15, 1966 |
| Hildred Lemke | February 14, 1966 |
| Kenneth Miller | February 14, 1966 |
| Shirley Roberts | February 15, 1966 |
| Joyce Shultz | February 14, 1966 |
| Harold Stone | February 11, 1966 |
| Shirley Garner | February 15, 1966 |
| Ida Gochenaur | February 18, 1966 |
| Elsie Goughenour | February 21, 1966 |
| Antoinette Loe | February 21, 1966 |
| Mavis Noble | February 21, 1966 |
| Helen Phillipy | February 18, 1966 |
| Myra Ridenour | February 18, 1966 |
| Marilyn Stapelton | February 21, 1966 |

but denies all other allegations of sub-paragraph (d) of rhetorical paragraph 6 of the Complaint. Respondent admits so much of sub-paragraph (h) of rhetorical paragraph 6 as alleges that Susan Dodge, Maria Lemasters, Hildred Lemke, Kenneth Miller, Shirley Roberts, Joyce Shultz, Shirley Garner, Ida Gochenaur, Elsie Goughenour, Myra Ridenour, and Marilyn Stapelton, to whom Respondent offered reemployment, on or about February 21 and 22, 1966 ceased or refused to work concertedly and went out on strike, and since such dates have engaged and are engaged in such concerted work stoppage and strike; but Respondent has no knowledge of the truth or falseness of

the remaining allegations of sub-paragraph (h) of rhetorical paragraph 6 of the Complaint and therefore neither admits nor denies such allegations.

7. Respondent admits the allegations of sub-paragraphs (a), (b), (c) and (d) of rhetorical paragraph 7 of the Complaint.

8. Respondent admits so much of sub-paragraph (a) of rhetorical paragraph 8 of the Complaint as alleges that on October 1 and on November 22, 1965, the Union requested the Company to bargain with respect to wages on December 17, 1965, and that on December 17, 1965, the Union requested the Company to bargain with respect to wages on January 7, 1965; but Respondent denies the remaining allegations of sub-paragraph (a) of rhetorical paragraph 8 of the Complaint. Respondent denies the allegations of sub-paragraph (b) of rhetorical paragraph 8 of the Complaint, including sub—sub-paragraphs (i), (ii), (iii), (iv), (v) and (vi).

9. Respondent denies the allegations of rhetorical paragraph 9 of the Complaint.

10. Respondent denies the allegations of rhetorical paragraph 10 of the Complaint.

11. Respondent denies the allegations of rhetorical paragraph 11 of the Complaint.

12. Respondent denies the allegations of rhetorical paragraph 12 of the Complaint.

13. Respondent denies the allegations of rhetorical paragraph 13 of the Complaint.

Dated at Indianapolis, Indiana, this 1st day of April, 1966.

CADICK, BURNS, DUCK & NEIGHBOURS
By /s/ CHARLES W. CULP
Attorneys for Respondent,
The Laidlaw Corporation

800 Union Federal Building
Indianapolis, Indiana
Phone — 639-1571

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF TRIAL EXAMINERS**
**WASHINGTON, D. C.**

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* * * (Caption Case No. 25-CA-2399) * * *

* * * (Caption Case No. 25-CA-2450) * * *

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WALTER J. MERCER, *Esq.*, for the General Counsel.

DONALD C. DUCK, *Esq.*, DOUGLAS J. HILL, *Esq.*, and CHARLES CULP, *Esq.*, all of CADICK, BURNS, DUCK and NEIGHBOURS, Indianapolis, Ind., for the Respondent.

KEITH WENTZ, International Representative, Hartford City, Ind., for the Charging Party.

Before: LOUIS LIBBIN, Trial Examiner.

## TRIAL EXAMINER'S DECISION

### Statement of the Case

Upon charges filed on December 13, 1965, on January 14 and 27, 1966, and on February 23 and March 23, 1966, by Local 681, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO, herein called the Union, the General Counsel for the National Labor Relations Board, by the Regional Director for the Twenty-Fifth Region (Indianapolis, Indiana), issued two complaints against the Laidlaw Corporation, herein called the Respondent. The complaint in Case No. 25-CA-2399 is dated February 28, 1966, and the complaint in Case No. 25-CA-2450 is dated March 23, 1966. The Regional Director also issued an Order, dated March 23, 1966, consolidating the two cases.

With respect to the unfair labor practices, the complaints, as amended at the hearing, allege that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) and Section 2(6) and (7) of the Act. In its duly filed answers, as amended at the hearing, Respondent denies all unfair labor practice allegations.

Pursuant to due notice, a hearing was held before me at Peru, Indiana, on April 11 to 13, 1966. All parties were represented at the hearing and were given full opportunity to participate and to adduce all relevant evidence. On May 25, 1966, the General Counsel and the Respondent filed briefs, which I have fully considered. For the reasons hereinafter stated, I find that Respondent has violated only Section 8(a)(1) and (3) of the Act in certain respects.

Upon the entire record in the case,[2] and from my observation of the demeanor of the witnesses, I make the following:

## Findings of Fact

### I. The business of the Respondent

Respondent, The Laidlaw Corporation, an Indiana corporation, maintains a plant in Peru, Indiana, where it is engaged in the manufacture and sale of wire and related products. During a 12-month period, Respondent has shipped material, valued in excess of $50,000, from its Peru plant to points outside the State of Indiana.

Upon the above admitted facts, I find, as Respondent admits in its answers, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. The labor organizations involved

The complaints allege, the answers admit, the record shows, and I find that Local 681, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

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[2] Inadvertent errors in the typewritten transcript of testimoney are noted and corrected in "Appendix A," attached hereto.

## III. The unfair labor practices

### A. *Summary of relevant events;*[3] *the issues*

Since 1962 the Union has been recognized by Respondent as the exclusive collective-bargaining representative of the production and maintenance employees at the Peru, Indiana, plant and has had collective-bargaining contracts with the Respondent for the employees in said unit. The current contract is for a 2-year period from December 14, 1964, with a 60-day annual automatic renewal clause. Pursuant to a reopening clause for negotiations on wages after the first year, the Union notified Respondent in October and November 1965, of its desire to reopen the contract for wage negotiations and submitted a schedule of its new wage proposals. On December 7, 1965, Respondent discharged Carmon Brown, who was vice-president of the Union and the Chairman of its grievance and bargaining committee, allegedly for violating a company rule against interfering with the work of other employees and a provision in the contract prohibiting union solicitation on company time. Negotiating meetings on wages were held on December 17, 1965, and on January 7, 1966, without any agreement having been reached. At noon on January 12, 1966, certain employees of Respondent went out on strike and began picketing Respondent's plant. The strike and the picketing were still in progress at the time of the instant hearing.

On January 15 and 18, William Massey, one of the strikers, made unconditional applications for reinstatement. He was denied reinstatement on January 15 on the ground that his job had been filled, and was offered reinstatement on January 18, because his job had become vacant again, but as a new employee without his full vacation rights and seniority. Massey refused the offer under these circumstances. Commencing February 11, 1966, wholesale unconditional requests for retinstatement were made by strikers.

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[3] Unless otherwise indicated, the factual findings set forth throughout this Decision are based on documentary evidence and testimony which are either admitted or undenied.

Respondent reinstated only a small number of the strikers, contending that the others had been permanently replaced. Eva Whtiaker, one of the strikers who was reinstated on February 16, was discharged 2 days later allegedly because she was a slow operator. On February 21, most of the reinstated strikers again went out on strike and joined those who had remained on strike.

The principal issues litigated in this proceeding are (1) whether the discharge of Carmon Brown was discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act; (2) whether the Respondent failed to bargain in good faith with the Union on and after January 7, 1966; (3) whether the strikes which began on January 12, 1966, were caused and/or prolonged by Respondent's unfair labor practices; (4) whether the failure to reinstate Massey without qualification was violative of Section 8(a)(3) and (1) of the Act; (5) whether the discharge of Eva Whitaker was motivated by her union and strike activity in violation of Section 8(a)(3) and (1) of the Act; (6) whether the failure to reinstate all the strikers and other conduct with respect to the strikers was violative of Section 8(a)(3) of the Act; (7) whether shortly before and during the strike Plant Manager John Johnston, and Foreman Leonard Krile and Elza Buttram, admitted supervisors within the meaning of the Act, engaged in unlawful interrogation and made threats of discharge violative of Section 8(a)(1) of the Act; and (8) whether Respondent has maintained and enforced an unlawful no-distribution rule on its premises in violation of Section 8(a)(1) of the Act.

### B. *The discharge of Carmon Brown*

The complaint alleges that Respondent discharged and thereafter refused to reinstate Carmon Brown because he was the vice president and principal bargainer for the Union and because he joined and assisted the Union and engaged in other union activity and concerted activities for the purposes of collective bargaining or mutual aid or protection. Respondent's answer admits the discharge and refusal to reinstate but denies that it was for the reasons alleged in the complaint.

1. The relevant facts

Carmon Brown was employed by Respondent from September 25, 1957, until his discharge on December 7, 1965. He worked in the racking department, in the maintenance department, and for a time as a foreman in the plating department. Brown was very active on behalf of the Union. Before the 1962 union election, he asked about 70 or 80 employees to sign union cards, admittedly some of them during company time. After the election, he became vice president of the Union, was chairman of its grievance and bargaining committee, and presented grievances to Respondent on behalf of other employees. He admittedly made no secret of his union activities. In the summer of 1963, Brown was promoted to foreman in the plating department, a position outside the bargaining unit. He admitted that at the time of his promotion, Respondent was well aware of his union activites. Upon becoming foreman, he resigned from the Union and ceased his union activities. In the fall of 1964, Plant Manager Johnston authorized the hiring of a private tutor for Brown, with one-half the cost to be borne by Respondent, in order to bring his education up from the 5th to the 8th grade. Although Brown was at first receptive to this program, he later refused to go along with it. In January or February of 1965, Brown, at his own request, was relieved of his position as foreman and assigned to maintenance work as a rank-and-file employee. After his transfer as a maintenance employee, Respondent offered to stand the full cost of raising Brown's education from the 5th to the 8th grade. A tutor was in fact engaged, but Brown only took two lessons. About 2 months after he ceased being a foreman, he rejoined the Union and again became active in Union affairs. In the summer of 1965, he successfully solicited about five or six employee signatures to checkoff authorizations during his lunch period. That day he was informed by Respondent that he would receive a wage increase. He admittedly did not try to conceal his union activities. On August 20, 1965, Brown's foreman, Cliff Hammer, at the direction of Plant Manager Johnston, gave Brown a written warning notice for "not following instructions, standing around, and delaying other employees." As a result of a grievance filed by Brown pursuant to the con-

tract, Johnston had the written warning "retracted and considered verbal" because Hammer "indicates no recorded previous verbal warnings to this man." In November, he was again elected vice president and was also chairman of the Union's negotiating and grievance committee, which was one committee. The vice president was the highest Union office at Respondent's plant, as the Union's president was employed at another plant. He also began the processing of grievances for other employees. On December 6, 1965, he spoke to Foreman Krile about a grievance filed by Rhea Bowman, the Union steward.

About 8:30 or 9 a.m., on December 7, 1965, Brown was working on a machine along the aisle. Harold Stone, employed by Respondent in the toolroom as a samplemaker, was in the aisle on his way to the fabrication department to get a safety guide for a machine welder. This was in the performance of his normal functions. Stone stopped at Brown's work station and started the conversation by telling Brown about Stone's wife working at Essex Wire and having been nominated for union steward there. Brown asked Stone if he had signed a union card. Stone replied that he had not but that he would like to. Stone left and returned about 10 minutes later to ask Brown if it was compulsory for everyone at the plant to join the Union. Brown replied that according to the contract it was not compulsory. Stone then turned around and walked away.[4]

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[4] The testimony of Brown and Stone with respect to these incidents are in accord except in one respect. Brown denied Stone's testimony that on the first occasion he asked Stone if he had signed a union card. The demeanor of the witnesses and the probabilities from all the surrounding circumstances lead me to credit Stone in this respect. Stone was a relatively new employee at that time. Brown testified that he did not remember whether he said anything to Stone. However, his admission that Stone returned to inquire if it was compulsory to join the Union is more consistent with Stone's version that Brown had first asked him if he had signed a union card. Moreover, Stone's admitted report of the conversation to Foreman Donat and Plant Manager Johnston, almost immediately

That morning, Plant Manager Johnston happened to observe Stone and Brown being engaged in the two conversations hereinabove described. He knew that Brown was doing a job as a maintenance employee at that particular time and that Stone "apparently was passing" by. He asked Foreman Donat to check into the matter because he allegedly had received many complaints about Brown. Donat, who was Stone's immediate foreman, spoke to Stone as the latter was returning to the toolroom, and asked what he and Brown were talking about. When Stone did not answer, Donat asked if they were talking about the Union. Stone replied that he supposed that's what they were talking about, and admittedly stated that Brown had asked him if he had joined the Union. Meanwhile, Johnston, who was returning to his office, stopped to see Cliff Hammer, Brown's immediate foreman, to relate what he had observed. At that point, Donat returned and reported that Stone had related that he had been delayed by Brown and was asked about joining the Union.

About a half hour later, Stone was summoned to Johnston's office. Foreman Donat and Trainee Employment Manager Grayson were also present. Johnston stated that he had been advised that Stone had been delayed in his work by Brown and was asked to join the Union on company time. Johnston asked if Stone would be willing to give a statement to the effect. Stone replied that he would. Johnston thereupon prepared a written statement which he read to Stone and which Stone signed. On cross-examination, Stone admitted that he was "certain" that the statement which he signed and which Johnston read to him was as follows: "I the undersigned Harold D. Stone was approached by employee Carmon J. Brown on this date about 8:30 a.m. on company time and tried to sell me on joining the union. He was delaying me in my work." Stone further admitted on

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thereafter, included this inquiry by Brown, as hereinafter found. Finally, Stone testified as a friendly witness for the General Counsel, having signed a union card and joined in the strike. It is difficult to conceive of any reason why Stone would have engaged in a fabrication in this respect.

cross-examination that at the time when he signed it, he thought it was a true statement, and that he had signed it "of my own free will."[5]

Johnston then called Foreman Hammer into the office, and they reviewed the Company's policies and rules. Based on the Company's rules and the Union contract, Johnston directed Hammer to discharge Brown. At the end of the shift, Brown was summoned to the office by Foreman Hammer. There Grayson read a letter to the effect that Brown had been "molesting" the help trying to get employees to join the Union on company time, that he had previously been warned against such conduct, and that they regretted having to let him go. Grayson then gave Brown a copy of the "Eligibility Information Report" required by the Indiana Employment Security Division, which stated as the reason for Brown's unemployment, "Disobeying Company Rules." Brown stated that he would file a grievance, and left.

The next day, Brown filed a grievance pursuant to the terms of the contract. In Grievance Form Step 2, the Respondent's answer, dated December 14, 1965, and signed by Johnston, states, "you have been interfering with work by bothering other employees on company time (during working hours) including the soliciting of employees to join the union. You have been previously warned that this violates the company rules, violates the contract agreement, increases production costs and delays production. For these repeated violations, you have been terminated." In Grievance Form Step 3, the Respondent's answer, which was received on December 24, 1965, and signed by President Mueller, states, "Article 1 Section 2 of the current collective bargaining agreement provides: 'Neither the union nor the members shall solicit Union membership or conduct union activities on company time. . . .' Plant rules provide: 'Vio-

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[5] On direct examination Stone had testified that he had "said something to Mr. Johnston that I had approached Mr. Brown" and that he had not told Johnston that Brown was delaying him. In view of Stone's admissions, I credit his testimony on cross-examination where inconsistencies may appear.

lation of any of the following major plant rules may be cause of immediate dismissal. . . . 12. Interference with work of or molesting other employees.' Your employment was terminated for repeated violations of the above." As of the date of the instant hearing, the grievance had not yet been processed through the fourth step, calling for arbitration.

2. Concluding findings

Plant Manager Johnston testified that in discharging Brown, he relied on Rule 12 of Respondent's plant rules and on Article 1, Section 2 of the current collective bargaining agreement. Respondent's plant rules, which were well publicized in the plant and admittedly known to Brown, appear on a sheet with the following heading on top: "VIOLATIONS OF ANY OF THE FOLLOWING MAJOR PLANT RULES MAY BE CAUSE OF IMMEDIATE DISMISSAL." Sixteen rules are listed under this heading. Rule 12 states: "Interference with work of or molesting other employees." Johnston testified that he was relying on the first part of this rule which relates to "interference" with the work of other employees. Article 1, Section 2 of the contract provides that "Neither the Union nor its members shall solicit Union membership or conduct Union activities on Company time, except as in Agreement otherwise specifically provided."[6]

Certain factors render Johnston's true motive highly suspect. Chief among these are the severity of the penalty meted out to Brown for such a brief and momentary infraction under circumstances where Stone initiated the conversations and where there was no real interference with Stone's work; the manner in which the evidence against

[6] In contending in his brief that Johnston testified on cross-examination that "soliciting" had nothing to do with Brown's discharge, the General Counsel is relying on an obvious error in transcription by the Reporter. It is readily apparent from the context that the word "soliciting" on page 444 of the typewritten transcript of testimony should be "molesting." The record is accordingly corrected, as set forth in Appendix A, attached hereto.

Brown was obtained, including the failure to interview Brown and obtain his version of the conversations; the fact that there were some variations in the reasons given for his discharge by Grayson and by other management personnel, as previously set forth, and the fact that in March 1965 Lawrence Howard, Respondent's then Director of Production, regarded Brown as an employee who would be missed if he were to find employment elsewhere. However, management's judgment in invoking the discharge penalty is not in issue or subject to review, unless it were to indicate disparite or discriminatory treatment. The foregoing are matters which, under the circumstances disclosed by this record, may more appropriately be considered by an arbitrator in the processing of Brown's grievance. For the equities surrounding Brown's discharge are not under consideration here; the sole issue is whether the discharge was in fact motivated by his union and concerted activities. I am convinced that the record warrants a finding that there is nothing more than suspicion to sustain that allegation.

In the first place, what is relevant is what was reported to Plant Manager Johnston, and not what actually happened, about the incidents which precipitated the discharge. Thus, the fact remains as previously found, that Stone admittedly attested in writing that he was approached by Brown and delayed in his work by Brown's attempt during company time to "sell" him "on joining the Union." There is nothing to indicate that Johnston should not have accepted Stone's statement as reflecting what actually occurred.[7] Indeed, Stone testified that he himself believed this to be a true statement at the time when he signed it. Stone further admitted that he signed this statement "of my own free will" without any threats or promises having been made to him. Brown's conduct, as thus reported by Stone, could therefore reasonably be interpreted as a violation of Plant Rule 12 in that it interfered with the work of another employee, and also a violation of the agreement in

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[7] The record does not support the General Counsel's assertion in his brief that Johnston testified that he had observed that "it was Stone who stopped Brown's work by starting the conversation."

that it involved union solicitation on company time. Such conduct could therefore form the basis for a discharge for cause, unless the record were to demonstrate that it was merely used as a pretext to conceal a discriminatory motive. No such demonstration is established by this record. The Respondent and the Union had been operating under collective-bargaining agreements since 1962. As of the time of Brown's discharge, the record discloses no antiunion conduct by Respondent or any unfriendly relations between the parties since the Union's certification in 1962. A date for the negotiations under the wage reopening clause had already been set for December 17, 1965. There is no showing of any union animus directed specifically against Brown or that Brown's Union position and protected Union activities, which admittedly were known to Respondent, were resented or looked upon with disfavor or regarded as being obnoxious. On the contrary, despite Brown's well known Union position and activities, he was promoted to the position of foreman and offered a private tutor, with one half the cost to be borne by Respondent, to bring his educational level up from the 5th to the 8th grade. There is not one iota of evidence to indicate that Brown was made a foreman in order to get him out of the Union and the bargaining unit, and the General Counsel makes no contention to the contrary. Even after he had ceased being a foreman and again became a rank-and-file employee, when it would be reasonable for Respondent to expect him to rejoin the Union and resume his union activities, he was still offered a private tutor, with the full expense to be borne by Respondent, to up-grade his education. Brown admittedly was aware of the posted plant rules and of the contract prohibition against union solicitation on company time, and also that an employee could be fired if he were caught violating them. Furthermore, the record shows that other employees had been disciplined and discharged for violating the plant rules and the provisions of the contract. Indeed, Brown himself had authorized such a discharge when he was foreman, as he admitted at the instant hearing. Moreover, although Johnston did not mention who had made complaints about Brown, the record discloses that in the summer of 1965 Brown had on three occasions solicited three different employees to join the Union, on each occasion while Brown

and the employee was working.[8] Finally, Brown had been given a verbal warning in August 1965 for "not following instructions, standing around and delaying other employees."

Upon the basis of the entire record considered as a whole, I find that the General Counsel has not sustained his burden of proving by a preponderance of the credible evidence that Brown's discharge was discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act.[9] Accordingly, I will recommend dismissal of this allegation.

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[8] This finding is based on the credited testimony of employee Richard Greer, a witness for Respondent who gave the specific details pertaining to each incident. Brown was not called in rebuttal to deny these incidents, although he had testified on the General Counsel's case-in-chief that the only time he had talked to anyone about the Union was on his lunch hour and breaks. On cross-examination, Greer first testified that he had not reported these incidents to any company representative and later admitted that he had volunteered this information to the Company in 1966, long after Brown's discharge. I do not regard this as impugning Greer's veracity with respect to the incidents set forth in the text. In addition, there is no affirmative showing that the other employees involved may not have reported them at the time when they occurred.

[9] There has been considerable delay in the processing of Brown's discharge grievance pursuant to the terms of the contract. This has been due partly to a misunderstanding by the parties relating to a proposed submission agreement pertaining to the fourth step, which is arbitration. As of the date of the instant hearing, the parties had not yet agreed on such a submission agreement to set the arbitration proceeding in motion. Under all the circumstances disclosed by this regard and the fact that resolution of Carmon Brown's discharge issue has a bearing on the refusal-to-bargain allegation, I find that the policies of the Act will be effectuated by entertaining jurisdiction with respect to the discharge allegation of Brown. *Greenwood Farms, Inc.*, 140 NLRB 649, 650, ftn. 1.

### C. *The refusal to bargain*

The complaints allege, the answers admit, and I find, (1) that all production and maintenance employees at the Respondent's Peru, Indiana, plant, exclusive of all clerical employees and all guards and professional employees, and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act; (2) that, as a result of an election conducted by the Board's Regional Director on June 7, 1962, the Union was certified on June 15, 1962, as the exclusive collective-bargaining representative of the employees in said unit; and (3) that at all times since June 7, 1962, the Union has been, and now is, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, within the meaning of Section 9(a) of the Act.

The complaints further allege, and the answers deny, that Respondent refused to bargain collectively with the Union as the exclusive collective bargaining representative of all the employees in the aforestated appropriate unit in that, in substance, (1) it refused to bargain on the subject of wages on December 17, 1965, January 7, 1966, and at all times thereafter, (2) commencing on or about January 7, 1966, and at all times thereafter it knowingly made unacceptable contract proposals in purported negotiations, (3) commencing on and after January 11, 1966, it unilaterally changed the hiring rate of unskilled female employees, (4) it refused the Union's request to furnish relevant data, and (5) it offered strikers and applicants for employment premium pay to cease striking and return to work.

#### 1. The relevant facts

On December 14, 1964, the Union and the Respondent executed their second 2-year collective-bargaining agreement, which provides in Section 4 of Article II that either party shall have the right, upon appropriate written notice, "to require the other to negotiate during the period beginning December 14, 1965, and ending January 13, 1966, with respect to changes then proposed by either in the minimum hourly rates of pay of employees then in effect or to

be in effect during the remainder of this Agreement." The section further provides that "such negotiations shall not extend beyond January 13, 1966."

By letter, dated October 1, 1965, International Representative McMahon advised Plant Manager Johnston that the Union "desires to open the present Labor Agreement for wages as set forth in that Agreement." Respondent's Attorney Duck replied by letter, dated October 8, 1965, that the negotiating period prescribed in the contract began in the "middle of December," and suggested that he contact Duck about the first of December to arrange "a meeting for the middle of the month." Shortly before November 22, 1965, International Representative Wentz telephoned to Attorney Duck, and asked for a meeting date to negotiate on the wage reopener. Duck stated he would look at the contract, then replied that the contract was open on wages from December 14 to January 13, and suggested a meeting for December 17. They agreed to meet at 2 p.m. on that date. By letter dated November 22, 1965, to Attorney Duck, Wentz confirmed that the "union representatives will be prepared to meet with company representatives at the offices of the Company in Peru, Indiana, at 2 p.m. on December 17." The letter then named the bargaining committee which would be present, and called attention to the Union's proposed schedule of wage rates which was attached "for your advanced consideration." These wage proposals called for an increase of 30½ cents per hour in the minimum starting rate for production employees.

The parties met on Friday, December 17, 1965, as scheduled. The Union was represented by International Representative Wentz, the Union's president and vice president, Chester Spencer and Carmon Brown, respectively, and an employee committee comprised of Mary Green, Polly Bowman, Rhea Bowman, and Virginia Durham. Respondent was represented by Attorney Duck, Plant Manager Johnston, the director and assistant director of production, Lawrence Howard and Kenneth Cook, respectively. Trainee Employment Manager John Grayson, and Walter Iber. Wentz was the spokesman for the Union and Duck was the spokesman for Respondent.

Wentz stated that the Company had had sufficient time to consider the Union's proposals and wanted to know what

its response or counterproposal was. Duck stated that he first wanted to explain the procedure which had been followed in previous negotiations because Wentz and some of the employee committee members had not been present during prior negotiations with Respondent. Duck then explained that the parties had decided as far back as 1962 that insofar as economic issues were concerned they did not want to engage in protracted negotiations, that the procedure they followed in the past was to have the Union representatives at the first meeting or meetings give their reasons and explanation in support of their proposals for economic changes, that the Company's representatives then presented to the Company and its board of directors as faithfully as they could the Union's reasoning in support of its proposals "for the Company's consideration in coming up with what it believed was its full and complete and the best solution for these proposals," and that the Company's representatives then submitted the Company's proposals at the next meeting. Duck stated that they would proceed on this basis unless someone objected or stated that they should proceed in a different way. No objection was voiced to this approach.

Duck then stated that the Union's proposals represented a substantial increase in rates and wanted to have the Union's reasons in support of these proposals for the Company's consideration in arriving at some decision or counterproposal. They first started with a discussion at the janitor's rate and then moved to the rates of the bulk of the female employees. In the latter connection, Duck mentioned a wage survey recently made in the Peru, Indiana, area by the Indiana Employment Security Division; stated that the results of this survey showed that Respondent was paying the bulk of its employees about 5 cents an hour above the average level reflected in the survey for similar work in the area; and wanted to know what justification the Union had for its proposal of a 30½-cent increase for factory production labor. Wentz replied that if that was the wage rate in the Peru area, it was too low; that he had negotiated contracts in small towns not far away with a much higher rate for factory labor; that he had recently read a report from the U. S. Department of Labor about the average factory labor rate being above $2 an hour; that he

did not think the Union's proposals were unrealistic; and that if the figures which Duck quoted were correct it was time somebody did something about it and that he did not know of any better place to start than here. Duck replied that nothing more could be accomplished that day and that the Company would consider the Union's reasons and proposal and would make a proposal of its own at the next meeting. Duck stated that the Company would need about a week to consider the Union's proposals. Wentz stated that he would not be available until January 5, 6, or 7, 1966, for another meeting. Duck tentatively agreed to meet on one of these dates but stated he would have to check his calendar when he returned to his office to find out which day. The meeting adjourned with the understanding that Wentz would telephone Duck on Monday, December 20, at which time they would set a specific date. The meeting had lasted from 30 to 45 minutes.

When Wentz telephoned to Duck on Monday, December 20, they agreed to meet at 2 p.m. on January 7, 1966, at the Company's office in Peru. Duck also stated that he would like to have an opportunity to meet with Wentz alone before January 7 to tell him what the Company's position would be at the January 7 meeting and to show him the records which the Company felt would support its position. Duck, who lives and maintains his office in Indianapolis, asked if Wentz would be in the Indianapolis area on January 5 or 6 or before they met on January 7. Wentz replied that he had no plans to be there but would telephone Duck if he did happen to be there. Not having heard from Wentz, Duck telephoned to him at his home on the evening of January 5. Duck stated that there was something he thought Wentz would be interested in knowing before the wage conference on January 7, but did not specifically indicate what it was. Duck asked if Wentz would be available to meet with him on January 6 for that purpose. Wentz replied that he would not be able to do so. Duck then asked if Wentz could meet with him privately in Peru on the morning of January 7, before the general wage meeting, so that Duck could present to him what the Company's position was going to be and the Company's records in support of it. Wentz replied that, because of a prior commitment, it would

be impossible for him to meet Duck before the scheduled negotiating meeting.

The parties met at Respondent's plant in Peru about 1:30 p.m. on Friday, January 7, 1966. The Union was represented by International Representative Wentz, International Vice President Taylor, and the same employee committee. Respondent was represented by Attorney Duck and the same management representatives. Also present was Federal Mediation and Conciliation Commissioner Hughes.

Duck handed Wentz a seniority list of Respondent's employees, with their job classifications and hourly rates, and stated that he was submitting this in response to Wentz' request of Plant Manager Johnston in December. Duck then stated that the Company had considered the Union's proposals and was prepared to make a proposal of its own. He stated that he had an audit of the Company's operations before him and that he wanted to read some information from it, adding that he would prefer that they did not write it down but that they had a right to write it down if they so desired. Duck then stated that in the fiscal year ending September 30, 1963, the Company had sustained an operating loss of approximately $41,000; that in the fiscal year ending September 30, 1964, the Company had an operating profit of approximately $22,000; that in the fiscal year ending September 30, 1965, the Company had sustained an operating loss of approximately $89,000; and that over that 3-year period there was a net accumulated operating loss of approximately $108,000. He commented that the Company had guessed badly on its business operations when it put a wage increase into effect the preceding year, and stated that the Company did not feel justified in increasing labor costs at this time because it was having cost problems in its operations. He then pointed out that for the first 2 months of the new fiscal year, which was October and November 1965, the operations of the Company showed a profit of approximately $8,800; that the operating statement for December had not yet been completed; and that the Company hoped this trend would continue. He added that if this trend continued for the first 6 months of the fiscal year, there would be every reason to believe that at that time the Company would feel justified in doing something about a wage increase. During the course of his

talk, Duck had not read any other information from the audit reports but had offered to let Wentz look at the reports. Wentz declined, pointing out that he would not understand them and that they probably would not mean anything to him.

Duck then stated that it therefore was the Company's proposal that it be given 6 months operational experience in its current fiscal year before being required to make a definite answer or proposal about changing its wage rate. He pointed out that this period would end April 1, 1966 less than 3 months away; that the auditors had given assurance that the 6-month operational audit would be ready by April 10; and that the Company had assured him that by April 15 they could sit down with the Union representatives and present the Company's proposals with respect to any wage changes. Duck also stated that the Union would be given the same 30-day period right to strike which they now had, in the event of failure to reach agreement in April. Duck concluded with the statement that this was Respondent's first, last, and final offer and that it would not be changed.

Wentz replied that "that had pretty well closed the door to any subsequent or further negotiations," and that the Union representatives would caucus and discuss what to do. When the meeting reconvened, Wentz told Duck that "the door had been rather effectively closed to any further negotiations by the Company's position," and that there was therefore not much point in staying around any longer. He explained that a special Union meeting had already been scheduled for the next day, and stated that they would submit and explain the Company's offer to the members and let them vote on it by secret ballot but that they would not recommend its acceptance. International Vice President Taylor informed Duck that if the employees voted to strike, they would get a check every week because the International had a substantial defense fund. The meeting ended about 2:45 p.m.

At the Union meeting held on Saturday, January 8, the membership rejected the Company's proposal and voted to strike. On the morning of January 10, 1966, Plant Manager Johnston was informed by a telegram from Wentz that the Company's proposal had been rejected by the member-

ship. The next day, January 11, Johnston received a telegram from Wentz that the members of the Union "will be on strike and picketing your plant on and after the strike deadline at 12 noon, January 12, 1966." Approximately 70 employees went out on strike, which began as scheduled.

On Tuesday, January 18, Attorney Duck received the following telegram from Wentz:

> REFERENCE THE LAIDLAW CORPORATION, PERU, INDIANA, . . . THE UNION AND MEMBERS OF LOCAL 681 REMAIN UNWILLING TO ACCEPT THE COMPANY'S STATEMENT AS TO ITS ALLEGED OPERATING LOSSES AT FACE VALUE. HOWEVER, THE MEMBERSHIP VOTED LAST NIGHT TO ASK THE COMPANY TO PERMIT THE UNION'S CPA TO CHECK THE COMPANY'S BOOKS AND REPORT HIS FINDINGS TO THE UNION. IN THE EVENT THE UNION'S CPA CERTIFIED TO THE UNION THAT THE COMPANY HAD IN FACT BEEN SUFFERING THE ALLEGED SUBSTANTIAL LOSSES THE POSITION OF THE UNION WOULD BE ALTERED AND A BASIS MAY THEN BE LAID FOR POSSIBLE SETTLEMENT DISCUSSIONS.

By letter dated January 26, 1966, Wentz informed John Mueller, Respondent's president, that he had sent the above-stated telegrams to Attorney Duck, to the Federal Mediation and Conciliation Service and to the Conciliation Service of the Indiana State Department of Labor. The letter concluded as follows:

> As of this date I have received no acknowledgement. I now write to request your personal reply to the above wire. If your reply to the above wire is negative be advised that, in the interest of both parties, we hereby request a conference with you personally present at Peru, Indiana.
>
> May we have your reply on or before January 31, 1966.

By letter to Wentz, dated January 31, 1966, Duck acknowledged the receipt of Wentz' telegram by himself and by President Mueller. Duck then review his unsuccessful efforts to meet with Wentz alone before the January 7

negotiating meeting. He also reminded Wentz that at the January 7 meeting Duck gave him the profit and loss figures from the Company's operating statements for the last 3 completed fiscal years and that Wentz stated the figures meant nothing to him. The letter concluded with the statement that "we further regret the necessity of advising you that the Company books and records are not now available for examination by the Union's CPA."

About 3 p.m. on February 2, 1966, the parties met again at the office of the Federal Mediation and Conciliation Service in Indianapolis. The Union was represented by Wentz, Attorney DeWester, and the employee committee. Respondent was represented by Attorneys Duck and McDowell. The Commissioner asked if there was any change in the position of the parties. Wentz replied that there was a change in the Union's position; and that the Union had reduced its proposal of a 30-cent raise for factory labor to a 25-cent raise and had also scaled down its other wage increase proposals. Wentz also proposed that all strikers be reinstated immediately. Duck stated that there was no change in the Company's position that it needed a period of 6 months' operation in the current fiscal year to determine whether it was in a position to make an upward adjustment in wage rates. Duck also told Wentz and the employee committee that the negotiating period had ended on January 13; that he was no longer under a contractual or legal obligation to negotiate; and that he did not want his presence and participation in this discussion to be construed as a waiver of the limitations of the contract on the period within which negotiations might be held on wage changes. With respect to the Union's proposal of immediate reinstatement of all strikers, Duck stated that many of the strikers had already been permanently replaced and that there was no opportunity at that time to reinstate the replaced strikers. One of the members of the employee committee asked Duck why the Company had hired new employees at $1.49½ per hour when the starting rate in the contract was $1.39½ per hour and many of the strikers had been working there at $1.49½ per hour for almost 10 years. Duck replied that he had been informed that some of the new hires during the strike were

doing a better job than some of the strikers. The meeting lasted about 15 minutes.

By letter dated February 8, 1966, Wentz requested Plant Manager Johnston to furnish "the following information which is needed by the union for collective bargaining purposes":

> A list of all employees within the bargaining unit as of Monday, February 7, 1966, and showing thereon each employees hiring date, rate of pay, job classification and the address of the employee.

By letter dated February 25, 1966, Office Manager Bookwalter informed Mavis Noble, one of the employees still on strike, that her "participation in the group [Hospital and Surgical] plan will terminate March 1st," that she "may continue the insurance on an individual basis by using the conversion form which is available" within "31 days immediately following the termination date of the group plan," and that "insurance on a group basis will be reinstated upon the first day of return to work, if within one year." Wentz replied by letter, dated March 4, 1966, in which he took issue with Bookwalter's statement relating to the termination of Mavis Noble's policy; pointed out that as the "sole collective bargaining agent for all your employees in the appropriate bargaining unit," the Union is "duty bound to insure that they, individually and collectively, are not discriminatorily, improperly or erroneously deprived of any benefit due and/or accruing to them"; and requested the following information "in order to enable us to carry out our duty and responsibility": The date of hire and separation of all employees on and after December 17, 1965, the date of each such employee's coverage by and termination of the group insurance plan, the specific reason for the termination of each such employee's group insurance coverage, and a list of all employees to whom Respondent sent a letter similar to the above-described Mavis Noble letter.

Respondent admittedly did not supply the information requested by the Union's letters of February 8. However, by reply letter dated March 17, 1966, Duck informed Wentz that all employees of Respondent are covered by "their group insurance program after ninety (90) calendar days

of employment", that "the group insurance contract (as set out in booklets previously furnished to employees and under the section entitled 'Termination of Employee Insurance', provide that the insurance of any employee under any part of the group policy automatically ceases if the employee has failed to make his contributions when due"; that because of this provision "the group policy coverage for all striking employees at Laidlaw Corp., in Peru ended at the time such employees ceased to make their contributions when due on the premium payments"; that "no contributions have been received by any striking employees on the insurance premiums due since such employees went on strike"; that "it therefore appears to Laidlaw Corp., and to the writer that none of the striking employees have been covered by the group policy since February 1, 1966"; and that "perhaps the best source of information concerning questions of Company group insurance coverage, termination of benefits or cancellation of coverage, or other provisions of the group insurance contract" is from the district agent of the Insurance Company, listing the latter's name, address and telephone number.

Since the commencement of the strike, Respondent has posted in laundrymats and in other public places "HELP WANTED" notices for "PERMANENT JOBS," calling attention to the $1.49½ per hour rate for "Unskilled Female Help." During the same period, Respondent has also run ads in the local paper for employees in the production unit. Beginning with January 13, the day after the commencement of the strike, and continuing through March 31, the Respondent hired about 92 new production employees at the starting rate of $1.39½ per hour and about 38 production employees at the $1.49½ per hour rate, with the overwhelming majority being female employees in the fabrication department. The current collective-bargaining agreement lists $1.39½ per hour as the minimum starting rate for these classifications, with an automatic 10-cent increase after 160 hours of work.

2. Concluding findings

The General Counsel asserts in his brief that "the following listed acts by the Respondent reveal its fixed plan

of conduct designed to undermine the Union and avoid its duty to bargain with the Union": The brief then lists seven acts which I will set forth and treat seriatim.

(1) "The discharge of the Union's leading in-plant spokesman and officer less than two weeks before the first negotiation meeting and after receipt of the Union's proposal."

All that need be said in this regard is that I have already found that the General Counsel has failed to sustain the allegation that the discharge of Carmon Brown was discriminatorily motivated in violation of the Act.

(2) "Arrival at the first negotiation meeting with no offer and a refusal to do anything except demand Union justification for any change in the status quo."

However, this was the same procedure which had been followed with the Union in negotiating economic issues in 1962, 1963 and 1964. There is no evidence that the Union had previously objected to this procedure. Moreover, this bargaining procedure was fully explained to the Union representatives and the employee committee at the first meeting on December 17, 1965, and the Union representatives were given a specific opportunity at that time to reject this approach if they so desired. However, no objections were voiced to proceeding in the same manner as the parties had in the past. Finally, in addition to asking the Union to justify its demands, Attorney Duck at this meeting communicated to the Union the results of a wage survey made by the Indiana Employment Security Division as indicating that Respondent's rates were above the average in the Peru area.

(3) "Presentation of a 'take-it-or-leave-it' offer at the second meeting which, in reality, was a refusal to make any proposal except that the Union wait until the lay off season to bargain."

What has been said before concerning the procedure of bargaining on economic issues applies here also. Attorney Duck had explained that the past procedure was for the Union to submit its proposals and supporting reasons at

the first meeting or meetings, and that the Company at the next meeting had submitted its counterproposal as its first, last, and final offer. As previously stated, the Union representatives agreed to follow the same procedure on this occasion. Indeed, as early as December 21, 1965, Union Representative Wentz referred in a letter to International Vice President Taylor to the meeting scheduled for January 7, 1966, as the "final conference." *General Electric Company*, 150 NLRB 192, cited by the General Counsel, turned on its own facts and is inapplicable to the facts in this case. Nor is it correct to say, as the General Counsel asserts, that Respondent's position was tantamount to a refusal to make any proposal except that the Union wait until the layoff season. Respondent's proposal was that it was in no economic position to give any wage increases at that time because of the net operational losses sustained in the past 3 fiscal years. It supported its position by the figures from its audit reports which it offered to show to Wentz. Respondent was under no duty to grant a wage increase and could have given the Union a definite and unqualified negative answer to its proposals because of Respondent's economic position. As an alternative to a flat rejection of the Union's request for wage increases at that time, Respondent proposed to defer the wage reopening period to April, a period of 3 months, in order to give the Respondent a 6 months' test of its operations in the current fiscal year, and promised that if at that time the trend of a profit shown by the first 2 months had continued it would then make a specific offer of a wage increase adjustment. That April was the period when there had been a seasonal slack in the past was coincidental. There is nothing in the record to warrant any inference that this was a tactic to enable Respondent to rely on an alleged seasonal slack. Respondent's unwillingness to make an offer of a wage increase at the meeting of January 7, 1966, "is hardly sufficient to warrant the conclusion that Respondent violated Section 8(a)(5) in bargaining with the Union. Such a finding would require a preponderance of evidence that Respondent did not, in fact, have an honest intention of reaching agreement rather than foster the processes of collective bargaining." *American Sanitary Wipers Co.*, 157 NLRB No. 97. No such finding is warranted by this record.

(4) "The plea of poverty without supporting data at the second meeting coupled with (1) a later refusal to permit financial checking and (2) a contemporaneous raise granted by Respondent at its California plant."

Contrary to the General Counsel's assertion, the supporting data for Respondent's economic position appeared in the audit reports for the last 3 fiscal years and for the first 2 months of the current fiscal year. Attorney Duck read the operational losses and profits from these reports which he had before him at this meeting and which he tendered to Wentz for his perusal.

As for the Union's request for permission to have its CPA examine Respondent's books, such a request was first made on January 18, 1966. The reopening clause in the contract placed two specific limitations on Respondent's duty to bargain. The first one was that the obligation to bargain was only "with respect to changes . . . proposed by either [party] in the minimum hourly rates of pay of employees." The second one was that the duty to bargain was only "during the period beginning December 14, 1965, and ending January 13, 1966." The last sentence of Section 4 of Article II of the contract emphasizes that "such negotiations shall not extend beyond January 13, 1966." It was Wentz' unavailability during the Christmas-New Year's holidays which was responsible for the short time during which the parties could negotiate during the period provided in the contract. At the January 7 meeting, Wentz declined Duck's proffer to examine the audit reports on the ground that he would not understand them. However, he made no request at that time that they be submitted to the Union's CPA; nor did the Union make any such request during the full week which still remained of the negotiating period. The Union's request on January 18, 1966, came too late and was untimely. Under these circumstances, Duck was legally justified in declining to make Respondent's books and records "now available for examination by the Union's CPA."

The General Counsel's further assertion that Respondent at the same time granted a wage increase to the employees at its California plant, without more, has no bearing on and is completely irrelevant to the refusal-to-bargain issue in this case.

(5) "The unilateral modification of the starting wage rate for female production employees during the strike."

The rates set forth on Schedule A of the current agreement are minimum hourly rates. Section 2 of Article II gives Respondent "the right to pay the employees an hourly rate in excess of the rate shown on Schedule A" when, "in the opinion of the Company, the employee possesses skill, experience or efficiency of operation on the job which justifies a higher rate." As previously found, during the period from the beginning of the strike until March 28, 1966, Respondent hired about 92 new production employees at the contract minimum rate of $1.39½ an hour and about 38 new production employees at $1.49½ per hour. The higher rate was paid to employees whose applications showed prior factory experience, even though the work involved was unskilled work. The determination of how much prior factory experience was required to obtain the higher rate was left entirely to the discretion of the employment manager and the particular supervisor involved. It is clear, and I find, that hiring at the $1.49½ rate did not constitute a modification of the contract but was specifically permitted by its express terms. Thus, Respondent acted within its lawful rights in hiring at the increased rate without consulting the Union.[10] Nor did this constitute the offer of a higher minimum rate directly to employees than had been offered to the Union during the negotiations on the wage reopener. For, as previously noted, negotiations during the wage reopener were by contract expressly limited to "minimum hourly rates" and could not deal with Respondent's right under Section 2 of Article II to pay employees a higher rate when justified, in its opinion, by prior experience. Finally, the higher rate did not reflect adversely on Respondent's good faith in refusing during the negotiation to grant a wage increase at that time because of past operational losses. For, Respondent's labor costs were not increased over their prestrike level by the payment of $1.49½ to 38 employees. Thus, the current contract provides for an automatic increase to $1.49½ after 160 hours of

[10] *California Portland Cement Company*, 101 NLRB 1436, 1437.

work, and at the time of the strike there were very few production employees who were still receiving $1.39½ per hour. Indeed, as of December 31, 1965, only 2 weeks before the strike, there were only six production employees who were receiving the $1.39½ rate, as appears from the seniority list which Duck gave to Wentz at the meeting of January 7, 1966. If anything, the Respondent's labor cost was less during the strike because there were fewer employees who were receiving the $1.49½ rate.

(6) "The threat of and refusal to reinstate any of the various long-term employees that made up the Union committee and hold office in the Union."

The General Counsel has not specified in his brief what threats he is referring to. Some statements by Respondent's supervisors are hereinafter found to be violative of Section 8(a)(1) of the Act. Respondent's refusal to reinstate strikers who applied was based on its claim that they had been permanently replaced during the strike. Although this is hereinafter found not to be a valid defense in all instances, and considering the violations hereinafter found, they do not justify or warrant a finding that Respondent was not bargaining in good faith during the required period.

(7) "The adamant refusal to bargain about anything at the February 2, 1966 meeting."

As previously noted, the negotiating period had ended on January 13, 1966, by the express terms of the current agreement. Respondent was therefore no longer under any legal or contractual obligations to bargain on "minimum hourly rates" during the term of the contract. Attorney Duck emphasized at that meeting that he was not waiving the contract's limitation on the period within which negotiations on wages might be held. Nevertheless, he did reiterate Respondent's proposal to defer the negotiations to April, as detailed by him at the previous meeting. I find nothing in Duck's action or conduct at this meeting which indicates that Respondent had not been bargaining in good faith.

I find no merit in any of the General Counsel's arguments in support of the refusal-to-bargain allegation. Nor

do I find any adequate record support for the additional allegation in the complaint that Respondent "knowingly made unacceptable contract proposals in purported negotiations for the purpose and with the intention of preventing agreement and avoiding and evading its obligation to bargain with the Union" and the allegation that "Respondent has offered strikers and applicants for employment premium pay to cease striking and return to work."

There remains for consideration the allegation that "on or about February 8, 1966, and on March 4, 1966, and at all times since, the Union has requested the Respondent to furnish to the Union data relating to the names of employees, seniority, job classifications, group insurance of employees and related matters, and the Respondent has refused to furnish said data." The first request, made in Wentz' letter of February 8, 1966, specified that the requested information was "needed by the Union for collective bargaining purposes." The only subject matter for which it appeared that the Union at that time desired to bargain was the wage rate. As the Respondent was under no legal or contractual obligation to bargain on wages at that time for the reasons previously detailed, its failure to furnish the requested data was not violative of the Act.

The second request, dated March 4, 1966, stands on a different footing. Information and data was requested with respect to the group insurance plan coverage and termination for all the employees in the bargaining unit in order to enable the Union to "insure that they, individually and collectively, are not discriminatorily, improperly or erroneously deprived of any benefit due or accruing to them." It is well settled that the certified collective-bargaining representative is entitled to have such information in order to police the contract by determining whether any inequities or meritorious grievances existed and by processing such grievances through the grievance provisions of the contract.[11] However, Duck's reply letter of March 17, 1966, though in general terms as previously detailed, constituted

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[11] See, e.g., *B. F. Goodrich Company*, 89 NLRB 1152, 1162; *Westinghouse Air Brake Company*, 119 NLRB 1118, 1126 and cases cited therein.

substantial compliance with Wentz' request. Wentz thereafter made no complaint that this did not comply with his request or seek any further clarifications or specific data in this regard.

Upon consideration of all the foregoing and the entire record as a whole, I am convinced and find that the General Counsel did not sustain his burden of proving by a preponderance of the credible evidence that Respondent failed to bargain in good faith within the meaning of Section 8(a)(5) and (1) of the Act. I will accordingly recommend dismissal of this allegation of the complaint.

D. *The strike commencing January 12, 1966*

On Saturday, January 8, 1966, a scheduled union meeting was held and attended by approximately 50 of Respondent's employees. Wentz reported in detail what had taken place at the negotiating session of the preceding day, and explained Respondent's proposal. Other committeemen filled in on this report. Mary Green, an employee member of the negotiating committee, expressed the opinion that to wait until April would place Respondent in a much stronger position because that was the beginning of the slow season when "they won't care whether we are working or out on the street." As a result of a secret ballot vote, the Respondent's proposal was rejected. A strike vote was then taken by secret ballot, and the result was virtually unanimous to strike.

On the morning of January 10, Plant Manager Johnston was informed by a telegram from Wentz that the Respondent's proposal had been rejected by the membership. The next day, January 11, Johnston received a telegram from Wentz, advising that "since no agreement has been arrived at in current wage negotiations initiated pursuant to the terms of the current labor agreement the members of Local 681 will be on strike and picketing your plant on and after the strike deadline at 12 noon, January 12, 1966." The strike began as scheduled, with the pickets carrying signs that "Local 681 on strike for fair wages." The strike and the picketing was still in progress at the time of the hearing in this proceeding.

The complaint, as amended at the hearing, alleges that the strike was caused by Respondent's alleged refusal to bargain. In his brief the General Counsel states: "Thus, if the Respondent had failed to bargain at this point in time [referring to the date when the strike vote was taken], the strike was an unfair labor practice strike from its inception." As I have previously found that the General Counsel has not sustained the allegation that Respondent's conduct in connection with the negotiations constituted an unfair labor practice, I find that the strike was an economic strike at its inception. However, as hereinafter found, the strike was converted into an unfair labor practice strike after February 11, 1966.

E. *Discrimination with respect to strikers*

1. The refusal to reinstate William Massey

(a) *The relevant facts*

William Massey was first employed by Respondent on June 5, 1961. When the strike began on January 12, 1966, Massey was a straight-and-cut operator at $1.99½ per hour. He went out on strike on January 12 and joined in the picketing. On Friday evening, January 14, Massey telephoned to Foreman Bridges and made an unconditional request for reinstatement. Bridges told him to come in at 7 o'clock the next morning. When Massey reported the next morning, he was told by Bridges to see Grayson, who was the Trainee Employment Manager. Massey reported to Grayson in the latter's office. Grayson told Massey that his job had been filled and that the positions of all male help had been filled at that time. He also told Massey that if Massey were to be reemployed, he would have to come back as a new employee with his rate reduced to $1.89½ per hour. This is the minimum starting rate set forth in the contract for a new employee in the classification of a straight-and-cut operator.

The following Tuesday, January 18, Grayson telephoned to Massey at the latter's home, and asked him to come back to work. Massey inquired about his rate of pay, and Gray-

son assured him that he would get the same pay which he was receiving when he went out on strike but that he would otherwise be treated as a new employee. Massey then inquired about his seniority and vacation pay. Grayson replied that he did not know and that Massey would have to talk to Plant Manager Johnston about that.

Massey had a telephone conversation with Johnston later that afternoon. Massey wanted to know about being reinstated. Johnston replied that a vacancy in Massey's classification had occurred that afternoon and that he would be happy to have Massey back. Johnston admitted that he further stated that Massey would have to come back as a new employee, without his seniority and vacation rights. When Massey expressed concern about his seniority and vacation rights, Johnston promised to see to it personally that those rights be restored to him after 60 days, but he reiterated that Massey would have to come back as a new employee. Massey refused to come back under those circumstances, and continued to participate in the picketing.

(b) *Concluding findings*

The complaint alleges, and the General Counsel contends, that Respondent's failure to reinstate Massey was violative of the Act. Respondent contends that Massey was an economic striker, that when he first applied for reinstatement on January 14, 1966, his job was occupied by a permanent replacement, and that there was no obligation on Respondent to discharge the permanent replacement in order to reinstate Massey. With this position and these well-established principles I agree and find that Respondent's refusal to reinstate Massey on January 15, 1966, was not violative of the Act.

Respondent further contends that Massey's right to reinstatement on January 18, 1966, when a vacancy in his position arose because of the resignation of an employee, was controlled by the same situation which had existed on January 15; that Massey's employee status was terminated during the strike when his permanent replacement was hired; and that once a person who is striking has been permanently replaced, he assumes the status of a new applicant when a vacancy thereafter occurs even though he continued

to be on strike in the interim. Therefore, Respondent further contends, its offer on January 18, when Massey's position became vacant again and he was inquiring about reinstatement, to hire him as a new employee without his vacation and seniority rights was not violative of the Act. I do not agree.

The Board has held that a returning economic striker, whose job is vacant at the time when he makes an unconditional request for reinstatement, may not, without violating the Act, be denied reinstatement as an employee, without prejudice to his seniority or other rights and privileges, because his job had been interveningly filled by a permanent replacement.[12] When Massey was denied reinstatement on January 15, he continued to participate in the strike and remained an economic striker. As such he continued, by virtue of Section 2(3) of the Act, to retain his status as an employee even though he was permanently replaced during the strike.[13] That an economic striker occupying the status held by Massey at the time when he again inquired about his job on February 18 is entitled to be treated as an employee under the Act, has been decided by the Supreme Court in *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, the leading case on the employee status of economic strikers under the Act. In that case, the Supreme Court held, in substance, that five strikers whose permanent replacements were still working at the time of the unconditional request for reinstatement "remained employees for the purposes of the Act and were protected against the unfair labor practices denounced by it." (304 U.S. at p. 345). The controlling criterion as to whether an employee who is engaging in an economic strike is entitled to rein-

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[12] *Union Bus Terminal*, 98 NLRB 458, 459, enfd. denied on other grounds 211 F.2d 820 (C.A. 5).

[13] Section 2(3) of the Act provides that:

> The term "employee" shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not obtained any other regular or substantially equivalent employment.

statement upon request is determined by the situation which exists at the time of each request for reinstatement.

In the instant case, Respondent was free to replace Massey in order to carry on its business and was not obliged to discharge his replacement to make room for Massey on January 15. But Respondent's privilege not to have to discharge Massey's replacement to make room for Massey as a returning striker is no longer operative once the job is again vacant, as was the case on January 18 when Massey again asked Plant Manager Johnston about his job. Under these circumstances the sole ground for the privilege—i.e. "to carry on his business"—disappeared and there is no bar whatever to the full inplementation of the rights of a returning economic striker. Departmental seniority was recognized by Respondent pursuant to the contract. Johnston admitted that as a new employee, Massey would have been in the category of a probationary employee during the first 60 days. The seniority and vacation rights had accrued to Massey and were vested rights of which he could not be deprived because of his participation in the strike.[14] Respondent was therefore obligated on January 18, 1966, to offer Massey full reinstatement to the status quo which he occupied at the time when he went out on strike. Respondent's refusal to reinstate Massey except as a new employee without immediate seniority and vacation rights did not fulfill this obligation and constituted discrimination with respect to his hire and tenure of employment in violation of Section 8(a)(3) and (1) of the Act.

2. The discharge of Eva Whitaker

(a) *The relevant facts*

Eva Whitaker was first employed by Respondent on November 4, 1965, at $1.39½ per hour, the minimum starting rate provided in the contract. She was a production worker in the fabrication department under Foreman Bridges. After 160 hours of work, she received the automatic 10 cents increase required by the contract. The collective-bargaining agreement also provides that "all new

[14] *Cone Brothers Contracting Company,* 158 NLRB No. 15.

employees shall be considered employed on a temporary basis for the first sixty (60) days worked in their new employment . . . and during such period such employees shall be considered on probation and without seniority and their retention as employees shall be entirely within the discretion of the Company."

In accordance with Respondent's practice and procedure for probationary employees, a rating form is prepared after the first 30 days of work. The rating form for Whitaker, dated December 15, 1965, was prepared by her foreman, Bridges. Her rating scale on this form was "poor." Her knowledge of the job was rated as "learning slowly and required attention"; and her work efficiency was rated as "slow, frequent errors. Careless, wastes time." Under the heading of "General Comments," Bridges indicated that he did not consider her progress satisfactory and that he would not like to keep her permanently in his department. He further indicated that he had not discussed the contents of the report with Whitaker. In accordance with Respondent's practice, another rating form is made out after a probationary employee has worked 45 days. The second Rating Form for Whitaker is dated January 7, 1966, and is also signed by Foreman Bridges. Her rating scale on this form is also "poor." The factors were rated substantially the same as before. Her "work efficiency" is rated as "frequently below standard. Must be proded. Fails to do her best." Under the heading of "General Comments," Bridges had again indicated that he did not consider her progress satisfactory. He also indicated that he was "not sure - doubtful" whether he would like to keep her permanently in his department. Plant Manager Johnston inserted the word "No" after Bridges' remark. Bridges had not discussed the contents of this report with Whitaker.

Whitaker went out on strike with the rest of the employees on January 12, 1965, and engaged in picket duty. During the strike, Plant Manager Johnston asked Foreman Bridges to give him a rating on the employees in his department. Johnston read the names from a list in his hand, and asked Bridges to state in each case whether he regarded the employees as good, poor or average both as to work and corporation. Bridges told Johnston that Whitaker was "average" on both counts.

On February 15, Respondent received from Whitaker a written unconditional offer to return to work. She received a telegram from Respondent, requesting her to return to work; reported to Foreman Bridges on February 16; and was put to work in the fabrication department, racking wires which were to be welded. At the end of her workday on February 18, Bridges, pursuant to instructions from Arlin Gallager, Respondent's then Director of Production, told Whitaker that he was sorry but he had to discharge her. Whitaker admitted that Bridges at that time told her that "the office said it was something about production." She admittedly was still a probationary employee at the time of her discharge. Her termination slip, dated February 18, 1966, and signed by Payroll Clerk Wells, states that she was "discharged for unsatisfactory performance within the probationary period."

(b) *Concluding findings*

The complaint alleges that in discharging Whitaker, Respondent was discriminatorily motivated because of her union and strike activity or in a belief thereof. Respondent contends that she was discharged because of her unsatisfactory work performance during her probationary period.

The decision to discharge Whitaker was made by Arlin Gallager, who became Director of Production on January 26, 1966, 2 weeks after the commencement of the strike. Gallager testified that he was in the plant about 95 percent of the time, making the rounds and observing the work of the employees; that on February 16 and 17 he was spending most of his time in the fabrication department; that he observed that Whitaker was a slow operator; that he instructed Foreman Bridges to watch her and to keep track of the production on her machine; that on February 18 he examined her personnel file and saw that she was rated "poor" on both reports; that, based on these rating forms which indicated no improvement in the 45 days that she worked there and the fact that she was a slow operator, he instructed Bridges to terminate her. He further testified that he was never permitted a probationary employee to acquire permanent status with less than a "fair rating."

As previously noted, the contract gives Respondent the sole discretion in determining whether to retain a probationary employee. This of course would be no defense if Respondent were in fact motivated by discriminatory considerations or accorded Whitaker disparite treatment because of her strike activity. Here, the record shows that during her first 45 days of employment, Whitaker was twice rated by her foreman, Bridges, as "poor," with her work efficiency "frequently below standard" and "fail[ing] to do her best." Moreover, although Bridges had told Plant Manager Johnston during the strike that he would rate Whitaker as "average" both as to her work ability and as to her "cooperation," he testified at the hearing that Whitaker "was a little below average" before the strike and that during the strike, her work was "about the same" as before. The foregoing not only attests to Gallager's good faith in making the above observations but also tends to verify their correctness. Foreman Bridges' testimony that some new hires during the strike were slower than Whitaker has no probative value, as the record does not show who they were or how long they had worked or what became of them. On the other hand, Gallager credibly testified, without contradiction, that Joe Ann Gillard was also discharged that same day for being too slow. The record shows that she was a new employee who was first hired during the strike on January 26. The termination notices of Whitaker and Gillard list identical reasons for their discharge. That Gallager was indeeed concerned with production is further demonstrated by his decision to discharge Foreman Bridges on February 18, about an hour after Whitaker's termination, "because I felt he was incompetent . . . he didn't, I would say, get the proper cooperation from the employees . . . ." On the other hand, of the 13 strikers reinstated by Respondent, only Whitaker was discharged. Her union and strike activity was no different from that of the other strikers. And there is no showing of any animus directed by Respondent to Whitaker.

Upon consideration of the entire record as a whole, I find that the General Counsel has not sustained his burden of proving by a preponderance of the credible evidence that Whitaker's discharge was discriminatorily motivated in

violation of Section 8(a)(3) and (1) of the Act. Accordingly, I will recommend dismissal of this allegation.

### 3. Discharge of, failure to reinstate, other strikers

#### (a) *The relevant facts*

On the evening of February 10, 1966, the Union held a meeting which was attended by about 50 striking employees. International Representative Rains recommended that the strikers should return to work unconditionally while the issues were being resolved by the Board with whom the Union had filed unfair labor practice charges. The strikers voted to accept Rains' recommendation and to return to work.

About 8 a.m. on Friday, February 11, Rains and approximately 40 strikers appeared in the reception room at Respondent's plant, prepared to go to work. Rains told Plant Manager Johnston of the vote taken at the Union meeting the preceding night and of the strikers' unconditional request to return to work immediately. In addition, each striker handed Johnston a signed statement in which the employee was "unconditionally offering to return to work immediately." Johnston told the group to be seated and stated that he would return shortly. Johnston then left and telephoned to Attorney Cook, and the two prepared a statement to be read to Rains and the strikers. Accompanied by Assistant Production Director Cook, Johnston returned to the reception room and read his written statement that many of the strikers "have been permanently replaced and are not entitled to reinstatement," and that those for whom it will be determined there are any job openings "will be notified on or before Monday to return to work." Rains pointed out that although all the strikers were not present that morning he was emphasizing that the unconditional offer to return to work applied to all members of the Union who were on strike. During the next 10 days, Respondent received in the mail signed letters from about 16 additional strikers, requesting unconditional reinstatement. Only a small number of the strikers had not submitted individual signed requests for reinstatement.

Respondent had reinstated three strikers prior to February 11, 1966.[15] During the period from February 15 to 22, 1966, Respondent reinstated 10 other strikers who had submitted written individual requests for reinstatement on and after February 11,[16] and offered reinstatement to 8 additional strikers who had also submitted such requests during that period but who did not accept the offer and continued to participate in the picketing and strike together with those who had not been offered reinstatement.[17] Thereafter, no other strikers were offered reinstatement despite the admitted very large turnover among the replacements and Respondent's continued advertisement for permanent unskilled help. Instead, beginning with February 16, 1966, Respondent sent all the strikers who had made written individual requests for reinstatement, excluding those herein named who had been reinstated or offered reinstatement, carbon copies of termination notices which listed the date of application for reinstatement as the "date of separation" and gave as the "reason for unemployment" that the person was "permanently replaced while on economic strike and no job available on xxx date of application for reinstatement."[18] The originals were mailed by Respondent to the Indiana Employment Commission.

At a Union meeting held on Sunday, February 20, 1966, Union Representative Rains met with a group of about 11 strikers who had been reinstated or offered reinstatement.

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[15] Roanen Nunn, Lynn Schofield, and Monnie Wellman.

[16] The picket line was removed when these returning strikers entered and left the plant. Eva Whitaker, Shirley Garner, Harold Stong, Susan Dodge, Joyce Shultz, Maria Lemasters, Shirley Roberts, Hildred Lempke, Kenneth Miller, and Helen Phillipy.

[17] Antoinette Loe, Marylin Stapleton, Myra Ridenour, Elsie Gougenour, Mavis Noble, Ida Gochenour, Edwinda Matlock, and Thelma Hires.

[18] February 11, 1966, is listed as the "date of separation" on about 37 of these termination notices.

Among other things, the group was protesting the fact that Respondent had sent the above-described employment termination notices to, and had failed to reinstate, the bulk of the strikers despite the prior unconditional request for reinstatement. Rains told the group that they did not have to go back to work if they did not so desire and that the Union had its "legal rights" to file unfair labor practice charges for terminating "our members." The employees thereupon decided to continue or to renew their strike participation, as the case may be, in protest against Respondent's alleged unfair labor practices in terminating and refusing to reinstate the strikers. Beginning with the next day, Monday, February 21, a group of 16 joined the remaining strikers in the picketing with signs which for the first time stated that the Union was "on strike protesting unfair labor practices."[19] The Respondent was notified that the employees were continuing or rejoining the strike "under the banner of UNFAIR LABOR PRACTICE STRIKE" because Respondent "saw fit to fire more than half of our Brothers and Sisters who were on strike too, and who had made the same effort to return to work." The strike and the picketing with these signs were still in progress at the time of the hearing in this proceeding.

Schedule A, attached to the General Counsel's complaint, lists the names of 77 employees as strikers. The General Counsel's motion at the instant hearing to strike the name of Roanen Nunn was granted. The record shows that Inge Finicle abandoned the strike on February 11, 1966, when she started on a new job for another employer, prior to the Union's request for reinstatement. There is no showing that the following five employees, listed on Schedule A, went out on strike: Lyle Brown, Dewey Cole,

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[19] Those who continued or rejoined the strike after being reinstated or offered reinstatement had not again applied for reinstatement as of the date of the instant hearing. They are listed in footnotes 16 and 17, *supra*, except for Eva Whitaker who was discharged on February 18, as previously found, and Helen Phillipy who continued to work.

Ronny Craw, Lawrence Lamons, and Patricia Viertal.[20] Excluding the above 7 and the 20 other strikers listed in footnotes 15, 16, and 17, *supra*, as having been reinstated or offered reinstatement, as well as William Massey who has previously been found to have been discrimanatorily denied reinstatement, there remain 49 employees listed on Schedule A who were strikers on February 11, 1966, and were never offered reinstatement. A comparison with Respondent's seniority lists as of December 31, 1965, and March 31, 1966 (G.C. Exhibits Nos. 17 and 47) shows the following breakdown for these 49 employees: 28 female production workers in the fabrication department, 16 female production workers in the finishing and packing department, 4 male employees as material handlers, and 1 male employee as janitor. An examination of General Counsel's Exhibit No. 6, which is a list of Respondent's employees, with their department and classifications, newly hired during the first 3 months of 1966, shows that during the period from February 12 to March 31, 1966, inclusive, Respondent hired at least 31 female production workers in the fabrication department, 11 female production workers in the finishing and packing department, 6 male material handlers in the fabrication department, 3 male material handlers in the finishing and packing department, and 1 janitor.

(b) *Concluding findings*

The complaint alleges that Respondent's conduct in refusing and failing to reinstate all the strikers after their

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[20] Respondent's Exhibit No. 9 shows that Lyle Brown and Ronnie Craw were employed as of January 12, 1966, as set-up men in the fabrication department. There is no showing whether they thereafter became strikers or quit or were terminated for other reasons. Respondent's Exhibits Nos. 9 and 11 show that Dewey Cole was employed as a material handler and Lawrence Lamons as a set-up man, and that both were working for Respondent on January 12 and February 11, 1966. G. C. Exhibit No. 47, which is Respondent's seniority list as of the end of March, 1966, lists Vera Viertal as employed since January 10, 1966.

unconditional request on February 11, 1966, and in thereafter terminating their employment status constituted unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act. Respondent contends in its brief that at the time of the strikers' request for reinstatement, the positions of all except those who were offered reinstatement had been filled by permanent replacements; that, as economic strikers who were permanently replaced, they were terminated as employees and Respondent was under no obligation to seek them out when vacancies thereafter occurred. The General Counsel contends in his brief that even if they were economic strikers, the Respondent has not satisfied its burden of showing what replacements were "actually employed in the position formerly held by the individual strikers." Finally, the General Counsel contends that the group of employees who had been offered reinstatement became unfair labor practice strikers when they continued or rejoined the strike on February 21, 1966, and are entitled to reinstatement, upon application.

(1) The request for reinstatement

A valid unconditional request for reinstatement was made by the Union on behalf of all strikers on February 11, 1966, despite the fact that not all the strikers submitted individual applications at that time or thereafter. As the Board recently stated, "under settled law, it is well within the Union's authority, as the employees' bargaining agent, to make an unconditional application for reinstatement on behalf of the strikers. . . ." *Trinity Valley Iron and Steel Co.*, 158 NLRB No. 80 (p. 4). However, as the strike at that time was an economic strike, as previously found, Respondent was obligated only to reinstate those strikers whose jobs at that time were not occupied by replacements who were assured of permanent status if their work proved to be satisfactory.

(2). The permanent replacements

Respondent's production workers admittedly had not been assigned to any permanent position in their respective departments; all regular employees did not work on the same job every day but were admittedly qualified to, and

did, perform all the tasks and operated all the machines in their department, in accordance with production requirements. Thus, some of the tasks performed by the female production employees at various times in the fabrication department were running the presses and benders, welding, cutting, racking, and trimming. Under these circumstances, I agree with Respondent that it was not necessary to show that a specific named permanent replacement occupied the position of a specific named striker. It was sufficient to show the replacement of strikers collectively. An examination of Respondent's exhibits, based on its original employment records which the General Counsel examined during the course of the instant hearing, convinces me, and I find, that at the time of the request for reinstatement on February 11, 1966, all strikers' jobs except five were filled by replacements who were assured of permanent status if their work proved satisfactory. Respondent offered the five unfilled jobs to five of the strikers almost immediately thereafter. Accordingly, I find that the Respondent's failure to offer reinstatement to all the strikers on February 11, 1966, was not violative of the Act.

(3) The discharge of the strikers

Respondent's position that economic strikers whose jobs were filled by permanent replacements at the time of their unconditional offer to return to work lose their employee status even if they continue to strike, is erroneous as a matter of law. When the strikers were not reinstated after their application on February 11, they resumed their strike and picketing activity, with reinstatement obviously becoming the immediate objective of the strike. As previously demonstrated in the case of William Massey, Section 2(3) of the Act preserved to these economic strikers the continuity of their status as employees even though they had already been replaced. Respondent however changed their status from that of employees to exemployees or former employees by their employment termination described in the separation notices which it sent to the State Employment Commission and to the strikers. That this change was intended as an actual and real employment termination, and not merely a matter of semantics, is demonstrated in the case of striker

Massey who was treated as a new applicant when he applied again at a time when his job became vacant again, as previously found. Indeed, Respondent admitted that its only obligation was to treat these continuing strikers as new applicants if they applied again when vacancies existed, conduct which I have found to be violative of the Act in the case of Massey. While not entitled to preferential treatment because of their conduct in continuing to strike, they were entitled to be treated as their employee status required. But by terminating their employee status, Respondent deprived these strikers of their right to full reinstatement as employees, without loss of seniority and other rights and privileges, upon application at a time when vacancies in their jobs existed. I therefore find that Respondent's conduct in terminating the employee status of the strikers was violative of Section 8(a)(3) and (1) of the Act.

### (4) The failure to reinstate all the strikers after February 11, 1966

The strikers who were not reinstated or offered reinstatement continued their strike activity.[21] The Respondent was well aware that its failure to reinstate all the strikers was the cause of the continuation of the strike, a fact which was very evident, and that therefore the strikers were still desirous of reinstatement. The current contract then in effect required Respondent to follow seniority in the recall of laid off employees where "skill, efficiency and dependability in the available work" was "relatively equal." This is not a case where Respondent would have been required to seek out former employees in order to offer them jobs in the vacancies which subsequently arose. Here, the strikers were still employees by virtue of Section 2(3) of the Act,

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[21] Larry Condon had abandoned the strike as of the date of the instant hearing, having obtained employment elsewhere; Bertha Parham had left the hospital about February 11 and had not been released by her doctor as of the date of the instant hearing; and Alexander Zelinsky ceased being on strike the Thursday before the instant hearing when he enlisted in the Armed Forces.

were protesting by their strike and picketing activities against Respondent's failure to reinstate them, and were thereby continuously reminding Respondent of their continued desire for reinstatement, a fact of which Respondent was aware.

Under all the circumstances, I find that the unconditional request for the reinstatement of all the strikers, made on February 11, 1966, was in the nature of a continuing application, at least so long as the strike was still in progress, and that this application remained in effect and was still current and operative when subsequent vacancies occurred and hirings were made.[22] As previously found in detail, during the period from February 12 through March 31, 1966, sufficient vacancies arose in jobs performed by the strikers to have enabled Respondent to reinstate practically all the strikers. I further find that Respondent's conduct in hiring new employees to fill these vacancies, instead of offering them to the strikers, was due to the fact that the latter had engaged in the strike and was therefore discriminatory and violative of Section 8(a)(3) and (1) of the Act.

In addition, on the basis of the entire record before me, I reach the same conclusion even if the February 11 re-

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[22] That an application for reinstatement may, under certain circumstances, be in the nature of a continuing and operative application has been held by the Board in *Container Mfg. Co.*, 75 NLRB 1082, 1086. Although the Court of Appeals for the Seventh Circuit reversed the Board on the facts in that case, it affirmed the principle that under certain circumstances an application may be regarded as in the nature of a continuing application. 171 F. 2d 769, 771-772. The cases cited in Respondent's brief are inapposite because they all turned on their own facts. Absent in those cases, as well as in the *Container* case, were the facts present in the instant case that the employees continued their strike and picketing activities in protest against the failure and refusal to reinstate them, that the employees so informed Respondent, and that there was in effect a contract requiring seniority to be followed in the recall of laid off employees.

quest for reinstatement were not regarded as in the nature of a continuing application. Two days before the strike, Foreman Krile told employee Hildred Lempke that he had orders to replace the four or five union members in his department, as hereinafter found. On the day before the strike, Plant Manager Johnston read a speech to the employees, emphasizing, among other things, that if they went out on a strike and were replaced, "you *LOSE FOREVER* your right to employment by this company." (Emphasis in original.) During the strike, Johnston confided to Foreman Bridges of the fabrication department that they should replace the strikers "as fast as we can" to get rid of the employees with the most seniority because they were the "troublemakers."[23] The seniority of the employee members of the bargaining committee ranged from approximately 2 to 6 years. Indeed, many of the strikers had long service records with Respondent, ranging up to 10 years.[24] Also, as previously noted, the contract then in effect required Respondent to follow seniority in the recall of laid off employees where other factors were "relatively equal." In addition, Respondent concedes, as its records show, that there was a very large turnover among the nonstrikers and strike replacements and that to the date of the instant hearing it was continuing to advertise for permanent unskilled help. Yet, although all the regular employees on strike ad-

[23] This finding is based on the credited testimony of Foreman Bridges. In assessing Bridges' credibility, I have taken into consideration the fact that he was discharged for cause by Respondent on February 18, 1966. He testified in a candid, straightforward, and unbiased manner which convinced me that he was a trustworthy witness entitled to be credited.

[24] The starting dates for some of these strikers are as follows: Elsie Hostetler—4/19/56; Betty Houk—8/12/57; Mary Barnhill—6/19/58; Rhea Bowman—7/28/58; Lavone Landis—8/21/58; Lois Snow—9/8/58; Catherine Wolfe—1/27/59; Polly Bowman—7/18/60; Mary Lepkojus—4/10/61; Eiko Oldham—4/21/61; Gertrude Hight—8/28/61; Rozena Patterson—11/6/61; Betty Crippen—9/14/62; about five strikers with starting dates in 1963; and about nine strikers with starting dates in 1964.

mittedly were experienced in all the jobs required to be performed in their respective departments, not a single striker who had once been replaced was recalled despite the many vacancies which arose in their jobs. Instead, as previously found, Respondent went to the trouble of continuously advertising for permanent unskilled help and hired approximately 50 totally new employees to fill vacancies which arose because of the subsequent employee turnover, sufficient vacancies to have enabled Respondent to have reinstated practically all the replaced strikers. I am convinced and find that Respondent's failure to recall any of the replaced strikers under the circumstances hereinabove described was discriminatorily motivated because they engaged in the strike and therefore in violation of Section 8(a)(3) and (1) of the Act.[25]

### (5) The unfair labor practice strike and strikers

As previously found, the 16 strikers who were reinstated or offered reinstatement after February 11, 1966, either continued or rejoined the strike because of Respondent's conduct in terminating and failing to reinstate the remaining strikers after their unconditional request for reinstatement. As I have previously found Respondent's conduct in these respects to constitute unfair practices within the meaning of Section 8(a)(3) and (1) of the Act, it follows, as I further find, that these 16 strikers became unfair labor practice strikers.

In addition, it is evident, and I find, that the continuation of the entire strike was attributed to Respondent's unfair labor practices in terminating and failing to reinstate the strikers after their unconditional request for reinstatement.[26] It therefore also follows, as I further find, that the entire strike became an unfair labor practice strike after February 11, 1966, and that all the strikers were henceforth unfair labor practice strikers.

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[25] See, e.g., *Marydale Products Company, Inc.*, 133 NLRB 1232, 1234-1235.

[26] See, e.g., *The Philip Carey Mfg. Co.*, 140 NLRB 1103, 1106, ftn. 6.

4. Termination of strikers' group medical benefits

The complaint alleges that Respondent also violated Section 8(a)(3) and (1) of the Act by its conduct "on or about February 25, 1966," in notifying the strikers "that their group insurance carried by the Respondent was being terminated." As previously found, Respondent's Employment Manager Bookwalter, by letter dated February 25, 1966, informed Mavis Noble, one of the strikers, that her "participation in the group plan will terminate March 1st" but "will be reinstated upon the first day of return to work, if within one year."

In response to Union Representative Wentz' inquiry in this regard, Attorney Duck informed Wentz of the terms of the group insurance contract; expressed the view that by virtue of the provisions of the group insurance contract and the failure of striking employees "to make their contributions when due on the premium payments," "none of the striking employees have been covered by the group policy since February 1, 1966"; and referred Wentz to the District Manager of the New England Mutual Life Insurance Company as "the best source of information" with respect to coverage and the Respondent's group insurance contract. It thus appears that whatever changes occurred in the strikers' group insurance coverage was by operation of the express terms of the insurance contract and not by any act of Respondent.

I find that Respondent's conduct with respect to the strikers' group insurance coverage is not violative of the Act.[27] I will accordingly recommend dismissal of this allegation.

F. *Interference, restraint, and coercion*

The complaint alleges that Respondent independently violated Section 8(a)(1) of the Act (1) by the conduct of Plant Manager Johnston and Foremen Krile and Buttram in threatening employment termination to employees if they

[27] See, e.g., *The Philip Carey Mfg. Co.*, 140 NLRB 1103, 1123.

participated in the strike and in interrogating employees concerning their "Union sympathies and allegiances and the Union plans and intentions," and (2) by maintaining and enforcing an invalid no-distribution rule.

1. As to threats and interrogations

(a) *The relevant facts*

Plant Manager Johnston read a prepared speech to the assembled employees in the plant cafeteria on the afternoon of January 11, 1964, the day before the strike. Among other things, he admittedly told the employees that Respondent had been advised that a strike was scheduled to "begin at noon tomorrow"; that those who wanted to go out on strike had a right to do so; that those who wanted to continue to work had a right to do so without interference by the Union and would be afforded ample protection by the mayor and police department; that the "Company has decided to continue to operate through the strike and in doing so will provide work for all employees who decide to work and will hire new employees to replace those on strike"; that "if you do go on strike and the Company hires a replacement for you, you *Lose Forever* your right to employment by this company; and that "I want to assure you that such *is* the law" (Emphasis in written speech).

About three days before the strike, Foreman Buttram talked to Virginia Durham, one of the employee members of the bargaining committee, and to employee Dorothy Scotten, about the Union "all day long." He tried to find out what the Union was going to do and when the Union would act. Durham told him that Plant Manager Johnston would be informed at the proper time. As Durham was leaving the plant when the strike began, Buttram told her that Respondent would replace the strikers with "cheap hillbillies" who would cross the picket line, adding that "it's been good to know you."[28]

On January 10, the Monday before the strike, Foreman Krile told Hildred Lemke, one of the employees under his

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[28] These findings are based on the credited and undenied testimony of Virginia Durham.

supervision, that he did not know that she belonged to the Union, that he did not think that there were "enough that belonged to the Union that could do any good," that there were only four or five in his department who belonged to the Union, and that he had orders to replace them. On the day before the strike, Krile told employee Garnett Good that "it won't do you a damn bit of good to go [on strike] because by the very next morning every damn one of you will be replaced." On the day of the strike, Krile told employee Kenneth Miller that Respondent already had applications and had already hired replacements.[29]

(b) *Concluding findings*

I find that the foregoing statements of Plant Manager Johnston and Foremen Buttram and Krile constituted a threat that the employees who went out on strike would immediately be replaced and then *forever* forfeit any right of employment with Respondent. That this is not a correct statement of the law has previously been demonstrated. I further find that such threats reasonably tended to interfere with, restrain and coerce the employees in the exercise of their rights guaranteed by Section 7 of the Act, and that Respondent thereby violated Section 8(a)(1). I also find that the foregoing does not establish that Respondent engaged in the type of interrogation proscribed by the Act.

2. As to the no-distribution rule

Respondent has maintained a set of "Plant Rules" which are posted on a sheet in the plant and were still in effect at the time of the instant hearing. A copy of these rules is given to each new employee so that he will be aware of

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[29] The findings in this paragraph are based on the credited testimony of Lempke, Good, and Miller. Krile admitted telling Lempke that he did not know how many belonged to the Union. He testified that he did not remember how this subject came up, and denied having made the other statements hereinabove set forth. I do not credit Krile's denials, as he did not impress me as a trustworthy and reliable witness by his demeanor while testifying.

them. One of these rules prohibits employees from "circulating petitions or printed matter of any kind on company premises." The sheet specifies that rules of this kind "will be enforced by means of a warning and disciplinary system," which may culminate in dismissal.

It is obvious that the above rule is sufficiently broad to encompass the distribution of union literature on nonworking time in nonworking areas.[30] It is now well settled that broad Company rules which prohibit the distribution of union literature during nonworking time in nonworking areas are unlawful, unless it is shown that "special circumstances" make the prohibiting rule necessary to maintain production or discipline.[31] Respondent made neither showing nor claim that any such "special circumstances" were present in the instant case. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by maintaining the above plant rule.

## IV. The effect of the unfair labor practices upon commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. The remedy

Having found that Respondent engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the polices of the Act.

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[30] *American Coach Company,* 158 NLRB No. 47, TXD (p. 3); *Lexington Chair Co.,* 150 NLRB 1328, 1340-1341, enfd. 62 LRRM 2273, 2275-2276 (C.A. 4).

[31] *Ibid; Walton Mfg. Co.,* 126 NLRB 697, enfd. 289 F. 2d 177 (C.A. 5); *Stoddard-Quirk Mfg. Co.,* 138 NLRB 615; *Lexington Chair Co., supra.*

Having found that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate William Massey with his seniority and vacation rights on January 18, 1966, I will order Respondent to offer him immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or vacation or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of the discriminatory refusal to reinstate him, by payment to him of a sum of money equal to that which he normally would have earned as wages from January 18, 1966, to the date of Respondent's offer of reinstatement, less his net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing and Heating Co., Inc.*, 138 NLRB 716.

I have also found that Respondent violated Section 8(a)(1) and (3) of the Act by failing to offer reinstatement to the replaced strikers when vacancies arose after February 11, 1966. As previously found, there were 49 strikers in this group, consisting of 28 female production workers in the fabrication department, 16 female production workers in the finishing and packing department, 4 male employees as material handlers, and 1 male employee as janitory. Also as previously found, during the period from February 12 to March 31, 1966, inclusive, there were vacancies, filled by new hires, for at least 31 female production workers in the fabrication department, 11 female production workers in the finishing and packing department, 9 male material handlers, and 1 janitor. It is therefore clear that, absent discrimination, all the strikers in this group, except five female production workers in the finishing and packing department, would have been offered reinstatement or recalled by March 31, 1966. Moreover, in view of the admitted continuous large turnover and Respondent's continued advertising for unskilled help, it is reasonable to infer, as I do, that sufficient vacancies have occurred in the finishing and packing department since March 31, 1966, to have enabled Respondent to reinstate the remaining five female production workers in the finishing and packing department. I will therefore order Respondent to offer to

the 49 strikers listed in Appendix C, attached hereto, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discriminatory failure to reinstate them by payment to each of a sum of money equal to that which each normally would have earned as wages from the date of the discriminatory failure to reinstate them to the date of Respondent's offer of reinstatement, less the net earnings of each during such period, with backpay and interest thereon computed in the manner prescribed in the preceding paragraph. It is reasonable to infer, and I find, that the order in which these strikers would have been offered reinstatement would have been governed by their departmental seniority. The commencement of the backpay period can therefore be determined by an examination of the seniority rosters and the dates when new hires were made in the respective classification and departments, all of which are presently exhibits in this record.[32]

I have previously found that the 16 strikers who were reinstated or offered reinstatement became unfair labor practice strikers on and after February 21, 1966. I will therefore order that, upon an unconditional application, Respondent shall offer to the 16 strikers listed in Appendix D, attached hereto, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privleges, dismissing persons hired by Respondent on and after February 21, 1966, if necessary to make room for them. *Almeida*

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[32] Larry Condon is included in Appendix C because it does not appear that he abandoned the strike before he would have been reinstated in accordance with his seniority standing. Alexander Zelinsky is included because his status has not been impaired by the fact that he left the strike to join the Armed Forces. Bertha Parham is included because her status as a striker has not been impaired by her illness during the strike. However, Respondent's offer to reinstate her will be conditioned upon her submission of a release from her doctor.

*Bus Lines, Inc.*, 142 NLRB 444. I will also order Respondent to make whole those listed in Appendix D, attached hereto, for any loss of pay suffered, or which they may suffer, by reason of Respondent's refusal, if any, to reinstate them in the above-described manner, by payment to each of them of a sum of money equally to that which each normally would have earned as wages during the period from 5 days after the date on which the employee unconditionally applies for reinstatement to the date of Respondent's offer of reinstatement, less his or her net earnings during said period, with backpay and interest to be computed in the manner previously described.

I have also found that Respondent violated Section 8(a)(1) of the Act by maintaining an invalid plant no-distribution rule. I will accordingly order Respondent to rescind the rule to the extent that it prohibits the distribution of union literature on nonworking time in nonworking areas on company premises.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

## Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to reinstate William Massey on January 18, 1966, with his seniority and vacation rights, by terminating the employee status of continuing strikers and by failing to reinstate them when vacancies arose after their unconditional request for reinstatement, Respondent has discriminated with respect to their hire, tenure, and terms and conditions of employment, thereby discouraging membership in the Union, and has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By the foregoing conduct, by maintaining in effect a rule prohibiting the distribution of union literature on nonworking time in nonworking areas on company premises, and by threatening employees with forever losing any

right to employment with Respondent if they went out on strike and were replaced, Respondent has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights and thereby has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not engage in any unfair labor practices alleged in the complaint which are not specifically found herein.

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

## RECOMMENDED ORDER

The Respondent, The Laidlaw Corporation, Peru, Indiana, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or activities on behalf of Local 681, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO, or any other labor organization, by terminating the employee status of continuing strikers or failing to reinstate them to existing vacancies, with full seniority and vacation rights, or by discriminating against them in any other manner with respect to their hire, tenure, or any terms or conditions of employment.

(b) Maintaining in effect a rule prohibiting the distribution of union literature on nonworking time in nonworking areas on company premises.

(c) Threatening employees with forever losing any right to employment with Respondent if they went out on strike and were replaced.

(d) In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Rescind the plant rule against the circulation of any petitions or printed matter to the extent that it prohibits the distribution of union literature during nonworking time in nonworking areas on company premises.

(b) Offer to William Massey immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or vacation or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of the discrimination practiced against him, in the manner set forth in the section of this Decision entitled "The remedy."

(c) Offer to those listed in Appendix C, attached hereto, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discriminatory failure to reinstate them, in the manner set forth in the section of this Decision entitled "The remedy."

(d) Upon application, offer to those listed in Appendix D, attached hereto, immediate and full reinstatements to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismising all persons hired by Respondent on and after February 21, 1966, if necessary to make room for them, and make them whole for any loss of earnings suffered or which they may suffer by reason of Respondent's refusal, if any, to reinstate them, in the manner set forth in the section of this Decision entitled, "The remedy."

(e) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary in determining the amount due as backpay.

(f) Notify William Massey and those listed in Appendices C and D if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(g) Post at its plant in Peru, Indiana, copies of the notice attached hereto and marked "Appendix B."[33] Copies of said notice, with Appendices C and D attached thereto, to be furnished by the Regional Director for the Twenty-fifth Region (Indianapolis, Indiana) shall, after being duly signed by authorized representatives of the Respondent, be posted by Respondent immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicious places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the said Regional Director in writing, within 20 days from the date of this Decision and Recommended Order, what steps the Respondent has taken, to comply herewith.[34]

I further recommend that the complaint be dismissed insofar as it alleges that Respondent violated the Act in respects not herein specifically found.

Dated at Washington, D. C.

/s/ Louis Libbin
Louis Libbin
Trial Examiner

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[33] In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[34] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

## APPENDIX A

I hereby note and correct the following inadvertent errors in the typewritten transcript of testimony:

| *Page* | *Line* | *Change* | *To* |
|---|---|---|---|
| 30 | 3 | contain | contact |
| 58 | 21 | Hill | Taylor |
| 100 | 18 | question | objection |
| 120 | 22 | on | one |
| 233 | 15 | strikes | strikers |
| 235 | 24 | " | " |
| 253 | 3 | It | He |
| 349 | 25 | working | walking |
| 354 | 10 | law | raw |
| 356 | 7 | And | At |
| 356 | 15 | legent | legend |
| 374 | 10 & 13 | 5th | 15th |
| 396 | 17 | any | an |
| 396 | 20 | say | see |
| 422 | 6 | January | November |
| 431 | 9 | He | We |
| 444 | 19 | Soliciting | Molesting |

## APPENDIX B

## NOTICE TO ALL EMPLOYEES

## PURSUANT TO

## THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

## NATIONAL LABOR RELATIONS ACT (AS AMENDED)

we hereby notify our employees that:

WE WILL NOT discourage membership in or activities on behalf of LOCAL 681, INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPER MILL WORKERS, AFL-CIO, or any other labor organization,

by terminating the employee status of continuing strikers or failing to reinstate them to existing vacancies, with full seniority and vacation rights, or by discriminating against them in any other manner with respect to their hire, tenure, or any term or condition of employment.

WE WILL NOT threaten employees with forever losing any right to employment with us if they should go out on strike and be replaced.

WE WILL NOT maintain in effect a rule prohibiting the distribution of union literature on nonworking time in nonworking areas on company premises.

WE WILL RESCIND our plant rule against the circulation of any petitions or printed matter to the extent that it prohibits the distribution of union literature during nonworking time in nonworking areas on company premises.

WE WILL offer to WILLIAM MASSEY immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or vacation or other rights and privileges, and will make him whole for any loss of earnings suffered as a result of the discrimination against him.

WE WILL offer to all those listed in Appendix C, attached hereto, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered as a result of the discrimination against them.

WE WILL, upon application, offer to all those listed in Appendix D, attached hereto, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing all persons hired by us after February 21, 1966, if necessary to make room for them, and will make them whole for any loss of earnings suffered by them as a result of our failure, if any, to reinstate them within 5 days after such unconditional application.

THE LAIDLAW CORPORATION
(Employer)

Dated ——— By ———
(Representative) (Title)

NOTE: — We will notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana 46204 (Tel. No. Melrose 3-8921).

## APPENDIX C

Richard Achey
Steven Achey
Diana Bakke
Mary Barnhill
Norma Black
Clara Blackman
Polly Bowman
Rhea Bowman
Myra J. (Michael) Bowman
Christine Brown
Nanola Browning
Dorothy Cain
Larry Condon
Betty Crippen
Martha Dalton
Virginia Durham
Dovie Fisher
Marjorie Flitcraft
Mildred Glaze
Janice Goll
Garnet Good
Dorothy Graham
Mary Green
Bobetta Harter
Elmer Hiers
Gertrude Hight
Elsie Hostetler
Betty Houk
Nellie Hughes
Marjorie Johnson
Risa Johnson
Marilyn D. Jones

Betty Kline
Janet Lampkin
Lavone Landis
Mary Lepkojus
Patricia Miller
Marie Nichols
Eiko Oldham
Kathleen Ousley
Bertha Parham
Rozena Patterson
Margaret Pierce
Wanda Rose
Dorothy Scotten
Lois Snow
Earlene Watson
Catherine Wolfe
Alexander Zelinsky

## APPENDIX D

Susan Dodge
Shirley Garner
Ida Gochenour
Elsie Goughenour
Thelma Hires
Maria Lemasters
Hildred Lempke
Antoinette Loe
Edwinda Matlock
Kenneth Miller
Mavis Noble
Myra Ridenour
Shirley Roberts
Joyce Shultz
Marylin Stapleton
Harold Stone

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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* * * (Caption Case No. 25-CA-2399) * * *

* * * (Caption Case No. 25-CA-2450) * * *

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## DECISION AND ORDER

On July 14, 1966, Trial Examiner Louis Libbin issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that these allegations be dismissed. Thereafter, the General Counsel and Respondent filed exceptions to the Trial Examiner's Decision and supporting briefs. Thereafter, the General Counsel filed a reply brief and Respondent filed an answering brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions,[1] and recommendations of the Trial Examiner as modified herein.[2]

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[1] In the absence of exceptions, we adopt *pro forma,* the Trial Examiner's dismissal of the allegation that the discharge of employee Eva Whitaker was discriminatorily motivated, and his dismissal of the allegation that Respondent's conduct with respect to termination of the strikers' group insurance coverage was violative of the Act.

In affirming the Trial Examiner we take particular note of that part of his Decision which in effect holds that replaced economic strikers who have made an unconditional application for reinstatement, and who have continued to make known their availability for employment, are entitled to full reinstatement to fill positions left by the departure of permanent replacements. In arriving at this conclusion, we specifically find that Respondent has not shown any legitimate and substantial business justification for not offering full reinstatement to these strikers and, that, accordingly, the failure to make such an offer constitutes an unfair labor practice even without regard to Respondent's intent or anti-union animus.[3]

The facts surrounding the issues of reinstatement rights are relatively free from dispute. On January 10, 1966, the Union voted to reject the Company's wage offer and noti-

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Member Brown would hold in abeyance a decision on the legality of the discharge of Carmon Brown, pending the outcome of the arbitration proceeding in this matter. See his dissenting opinion in *Producers Grain Corporation,* 169 NLRB No. 68, and his concurring opinion in *Cloverleaf Division of Adams Dairy Co.,* 147 NLRB 1410.

[2] We do not agree with the Trial Examiner's conclusion that there was no showing that Patricia Viertal was one of the strikers. The unrebutted testimony of Betty Houk, recording secretary of the Union, was that Viertal pulled strike duty. Moreover, while General Counsel's Exhibit 47, Respondent's seniority list of March 1966, upon which the Trial Examiner relies for his finding, does include Viertal's name, it also includes the names of a number of acknowledged strikers. They, like Viertal, have the notation "NW" (not working) alongside their names. It is clear, therefore, that this list has little if any probative value in determining the strike status of Viertal. In view of the unrebutted testimony on Viertal's strike activities, we conclude she was one of the strikers. Accordingly, we shall add her name to Appendix C, as a striker entitled to reinstatement and backpay.

[3] *N.L.R.B.* v. *Fleetwood Trailer Co.,* 389 U.S. 375; *N.L.R.B.* v. *Great Dane Trailers,* 388 U.S. 26.

fied the Company of an intent to strike on January 12. As noted by the Trial Examiner, on the day before the strike Plant Manager Johnston read a speech to employees emphasizing that if they went out on a strike and were replaced, "you *LOSE FOREVER* your right to employment by this company." On January 12 approximately 70 employees began the strike with the pickets bearing signs indicating that the strike was for "fair wages."

One of the strikers was William Massey, an employee since 1961. On January 14 Massey made an unconditional request for reinstatement but was told his job had been filled and that if he were reemployed it would be as a new employee at the rate of $1.895 per hour as opposed to the $1.995 Massey made before the strike. On January 18 Massey was called by the Company and asked to return, as a vacancy had occurred in his classification. Massey was offered his old rate of pay, but was informed he would otherwise be treated as a new employee, without his seniority and vacation rights. When he expressed concern about these terms, Plant Manager Johnston promised to see that the rights were restored in 60 days, but reiterated that Massey would have to come back as a new employee. Under these circumstances Massey refused to return and continued on strike.

At a Union meeting on February 10, attended by about 50 of the employees, the strikers voted to return to work. On Friday, February 11, Union Representative Rains and some 40 strikers appeared at the plant and made an unconditional request to return to work. The unconditional offer to return was made on behalf of all the strikers, not just those who accompanied Rains. In addition, each of the workers who accompanied Rains presented a signed statement offering to return immediately and unconditionally. After consulting with his attorney, Plant Manager Johnston read a prepared statement to the effect that many of the strikers had been "permanently replaced and are not entitled to reinstatement," and that those for whom there was a job would be notified on or before Monday. The Trial Examiner found, and we agree, that as of February 11 the strike was an economic one, and that as of that date all but five of the economic strikers' jobs were filled by replace-

ments who were assured of permanent status if their work proved satisfactory. As the five strikers who were not replaced were thereafter offered jobs, Respondent's actions were proper and not in violation of the Act.

In addition to the written applications for reinstatement which were submitted on February 11, other written applications were made, between February 11 and 21, by about 16 employees who had not been present at the February 11 meeting. On the dates these later applications were received Respondent checked to see if vacancies existed at that time, and if they did, some of the applicants were hired. However, new applicants were hired if the vacancies exceeded the number of striker applicants. By February 22 a total of 10 strikers had been reinstated and 8 others had been offered reinstatement, but had declined and remained on strike. The Respondent did not check over the earlier reinstatement applications of February 11 before making new hires, and reinstatement applications were considered only on the date of application. Plant Manager Johnston's testimony[4] established that this hiring policy was newly inaugurated after the strike and apparently conformed with and implemented Respondent's previously voiced threat that once replaced, strikers "lose forever" their right to employment by the company. Be-

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[4] At page 429 of the record, Plant Manager Johnston was questioned about Respondent's recall and hiring policy and testified as follows:

Q. You do follow seniority in all departments?

A. Yes. But we worked out the first and foremost *after the walkout.*

Q. You felt no obligation whatsoever on the 15th [February] to fill these other five slots with people who applied just two or three days before that, when they were former employees?

A. We were handling this on the basis of the dates they applied for reinstatement.

Q. If they didn't apply on the right day you weren't going to call them the next day, so to speak? . . .

A. Yes, sir. (Emphasis supplied.)

ginning on February 16 Respondent sent strikers, except those who had been reinstated or had declined reinstatement, termination notices that they had been replaced as of the date of their written reinstatement applications and that no jobs were available. However, Respondent continued to advertise for permanent help and a number of new employees were hired due to turnover, which included the departure of some permanent replacements.

At a Union meeting on February 20 a group of strikers who had been reinstated, or offered reinstatement, protested the employment termination notices to the strikers and the failure to reinstate the bulk of the strikers. The employees decided to renew their strike over this alleged unfair labor practice and on February 21, 16 of them continued or rejoined the strike. Thereafter, no other strikers were offered reinstatement.

The Trial Examiner found that when Massey first applied on January 14, his job was occupied by a permanent replacement and Respondent was not obligated to reinstate him. He further found that Massey remained an employee by virtue of Section 2(3) of the Act, and when he again applied at the time the position was vacant he was entitled to full reinstatement, and Respondent's failure to grant him full reinstatement was violative of Section 8(a)(3) and (1) of the Act.

The Trial Examiner also concluded that Respondent violated Section 8(a)(3) and (1) of the Act by terminating the employment status of strikers and discharging them after February 11, contrary to their rights under Section 2(3) of the Act which preserved their status as employees, thus depriving them of their rights to full reinstatement at times when vacancies in their jobs arose; that the applications for reinstatement were continuous; that sufficient vacancies subsequently arose to enable reinstatement of all the strikers, and that the filling of vacancies by hiring new employees rather than by offering the positions to strikers was discriminatory. Moreover, the Trial Examiner reached the same conclusion; i.e., that the failure to recall was discriminatorily motivated, even if the reinstatement applications were not regarded continuous, because of certain conduct and statements by Respondent's representa-

tives and because of its failure to recall the older employees with long experience while at the same time advertising for new help to fill vacancies. As the Trial Examiner concluded that the strike continued after February 11 due to Respondent's unfair labor practice in terminating strikers and failing to reinstate them, he found that the strike became an unfair labor practice strike on and after that date.

As for the 16 strikers who were reinstated or offered reinstatement and who continued or rejoined the strike, the Trial Examiner found that their action was precipitated by Respondent's unfair labor practices in terminating and failing to reinstate the remaining strikers, and that these 16 became unfair labor practice strikers on and after February 21 when they decided to continue or rejoin the strike, and as such, they were entitled to reinstatement upon unconditional application.

We concur in the conclusions of the Trial Examiner and in the relief granted Respondent's employees. In so doing we rely particularly on the principles set forth in *Fleetwood Trailer Co.*,[5] in which the Supreme Court discussed the rights of economic strikers to reinstatement and the responsibility of employers to fully reinstate economic strikers, absent "legitimate and substantial business justifications," in a situation where production increased and more jobs were reestablished.

In *Fleetwood*, the employer was held to have violated the Act by failing to reinstate strikers and by hiring new employees for jobs which were reestablished when the employer resumed full production some 2 months after the strikers applied for reinstatement. In so finding, the Court pointed out that by virtue of Section 2(3) of the Act, an individual whose work ceases due to a labor dispute remains an employee if he has not obtained other regular or substantially equivalent employment, and that an employer refusing to reinstate strikers must show that the action was due to legitimate and substantial business justification.[6] The Court further held that the burden of proving

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[5] Footnote 3, *supra*.

[6] Citing *Great Dane Trailers*, footnote 3, *supra*.

such justification was on the employer and also pointed out that the primary responsibility for striking a proper balance between the asserted business justifications and the invasion of employee rights rests with the Board rather than the courts. The Court also noted that an act so destructive of employee rights, without legitimate business justification, is an unfair labor practice without reference to intent or improper motivation. Furthermore, the Court explicitly rejected the argument, asserted by the employer in *Fleetwood* and relied upon by the Respondent in the instant case, that reinstatement rights are determined at the time of initial application.

> It was clearly error to hold that the right of the strikers to reinstatement expired on August 20, when they first applied. *This basic right to jobs cannot depend on job availability as of the moment when applications are filed.* The right to reinstatement does not depend upon technicalities relating to application. On the contrary *the status of the striker as an employee continues until he has obtained "other regular and substantially equivalent employment."* 389 U.S. 375. (Emphasis added.)

Application of these principles to the case before us makes it evident that the results reached by the Trial Examiner were correct, even though he did not have the benefit of the Supreme Court's *Fleetwood* decision, which issued subsequently.

Thus, in the case of Massey, he remained an employee when he rejoined the strike after his first effort to be reinstated was rejected even though at that particular moment he had been replaced. The right to reinstatement did not expire when the original application was made. When the position again became vacant, Massey, an economic striker who was still an employee, was available and entitled to full reinstatement unless there were legitimate and substantial business justifications for the failure to offer complete reinstatement. However, it is evident that no such justifications existed, for in fact Respondent needed and desired Massey's services, and it was Respondent who sought out Massey when the vacancy occurred. But its offer

of employment as a new employee or as an employee with less than rights accorded by full reinstatement (such as denial of seniority), was wholly unrelated to any of its economic needs, could only penalize Massey for engaging in concerted activity, was inherently destructive of employee interests, and thus was unresponsive to the requirements of the statute, *N.L.R.B. v. Erie Resistor Corporation.*[7] In these circumstances there was no valid reason why Massey should not have been offered complete reinstatement, and Respondent's failure to do so was in violation of Section 8(a)(3) and (1) of the Act.

Similarly, we are guided by *Fleetwood* and *Great Dane* in our consideration of the strikers whom Respondent terminated and did not recall after their application for reinstatement on February 11 and thereafter. As in the case of Massey, they remained employees, and their right to reinstatement did not expire on the date they first applied, even though replacements filled most of the positions at the precise time they sought reinstatement. As employees with outstanding unconditional applications for reinstatement at the time the strike changed into an unfair labor practice strike, on and after February 11,[8] these strikers were entitled to full reinstatement as vacancies arose in their old positions. This conclusion was foreshadowed long ago by, and is consistent with, the Supreme Court's decision in *N.L.R.B. v. Mackay Radio & Telegraph Co.*[9]

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[7] 373 U.S. 221.

[8] As we have found in accord with the Trial Examiner that the strike herein was converted to an unfair labor practice strike on and after February 11, 1966, none of the striking employees could have been permanently replaced by new employees hired on or after February 11. Therefore, the Trial Examiner's conclusion (at page 30) that some 16 strikers could have been replaced until February 21 is modified accordingly.

[9] 304 U.S. 333, 347:

> It [Respondent] might have resorted to any one of a number of determining *which of its striking employ-*

Furthermore, we would so hold even if we did not concur in the Trial Examiner's finding that the strike was converted from an economic to an unfair labor practice strike on February 11. As economic strikers their situation would have been essentially the same as Massey's; i.e. they remained employees who had offered to abandon the strike and who were available to fill openings as such arose. As Respondent brought forward no evidence of business justification for refusing to reinstate these experienced employees while continuing to advertise for and hire new unskilled employees, we find such conduct was inherently destructive of employee rights.[10] This right of reinstatement continued to exist so long as the strikers had not abandoned the employ of Respondent for other substantial and equivalent employment. Moreover, having signified their intent to return by their unconditional application for reinstatement and by their continuing presence, it was incumbent on Respondent to seek them out as positions were vacated. Having failed to fulfill its obligation to reinstate the employees to their jobs as vacancies arose, the Respondent thereby violated Section 8(a)(3) and (1) of the Act.

In arriving at our decision we are cognizant of a number of earlier cases in which the Board stated or implied that replaced economic strikers were thereafter entitled only to nondiscriminatory treatment as applicants for new employment.[11] In *Brown and Root, Inc., et al.*,[12] a backpay proceeding, the General Counsel alleged that vacancies occurred after applications were made and contended they should have been assigned to strikers as they arose. The

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*ees would have to wait* because five men had taken permanent positions during the strike. (Emphasis added.)

[10] *N.L.R.B. v. Fleetwood Trailer Co., supra; N.L.R.B. v. Great Dane Trailers, supra; N.L.R.B. v. Erie Resistor Corp., supra.*

[11] See *Bartlett-Collins Company,* 110 NLRB 395, 397, 398; affd. 230 F.2d 212 (C.A.D.C.); cert. denied 351 U.S. 988.

[12] 132 NLRB 486, enfd. 311 F.2d 447 (C.A. 8).

Trial Examiner, finding no vacancy *on the date* applications were made, rejected this approach as improperly assuming Respondents had a duty to seek out economic strikers as vacancies became available. The Board affirmed this holding on the grounds that it was the normal practice of Respondents to hire the first available person and that there was no obligation to seek out or prefer the strikers for vacancies which occurred after their application.[13]

In essence, therefore, these earlier cases held that an economic striker's right to full reinstatement is determined at the time application for reinstatement is made, and that if a replacement occupies the position at that particular moment, the striker is henceforth entitled only to nondiscriminatory consideration as an applicant for new employment. But, as we have noted previously, the Supreme Court in *Fleetwood* and *Great Dane* has now held that the right to the job does not depend on its availability at the precise moment of application, and that strikers retain their status as employees who are *entitled to reinstatement* absent substantial business justification, and regardless of anti-union animus.

The underlying principle in both *Fleetwood* and *Great Dane, supra,* is that certain employer conduct, standing alone, is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed.[14] Specifically in *Fleetwood,* the Court found that hiring new employees in the face of outstanding applications for reinstatement from striking employees is presumptively a violation of the Act, irrespective of intent unless the employer sustains his burden by showing legitimate and sub-

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[13] For a decision of similar import see *Atlas Storage Division,* 112 NLRB 1175, 1180, footnote 15, enfd. 223 F.2d 233 (C.A. 7).

[14] See also *N.L.R.B. v. Erie Resistor Corp., supra.*

Even if a finding of antiunion motivation is necessary, the employer's preference for strangers over tested and competent employees is sufficient basis for inferring such motive, and we, in agreement with the Trial Examiner, would do so if we considered motive material.

stantial reasons for his failure to hire the strikers. A similar parallel exists here which requires application of the same principle. When job vacancies arose as the result of the departure of permanent replacements, Respondent could not lawfully ignore outstanding applications for reinstatement from strikers and hire new applicants absent legitimate and substantial business reasons,[15] irrespective of intent. Moreover, we find in accord with the Trial Examiner, that Respondent was in fact discriminatorily motivated when it implemented its avowed policy of not considering or hiring strikers once they had been replaced or if no vacancy existed on the date of application.[16]

We hold, therefore, that economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons. Accordingly, to the extent that *Bartlett-Collins, Atlas Storage Division, Brown and Root, supra,* and cases of similar import hold or infer otherwise, they are hereby overruled.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and orders that Respondent, the Laidlaw Corporation, Peru, Indiana, its offi-

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[15] E.g., as may be justified by a change in an employer's operations or where striker applicants lack requisite skills.

[16] A refusal to consider or reinstate strikers once they have been replaced when vacancies thereafter occur is in effect a "delayed" discrimination which does not assume a mantle of lawfulness merely because certain lawful conduct, the hiring of a permanent replacement, intervened.

ers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

Appendix C is modified by adding the name of Patricia Vietal.

Dated, Washington, D. C. JUN 13 1968

Frank W. McCulloch, Chairman
John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
Sam Zagoria, Member

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

---

* * * (Caption Case No. 26-CA-2399) * * *

* * * (Caption Case No. 25-CA-2450) * * *

---

ORDER CORRECTING DECISION AND ORDER

On June 13, 1968, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding in which inadvertent errors appear.

IT IS HEREBY ORDERED that the said Decision and Order be, and it hereby is, corrected by inserting the word "as" between the words "regarding" and "continuous" on line 11 of the second paragraph on page 5; and by striking footnote 9 in its entirety and substituting therefor the following:

[9] 304 U.S. 333, 347:

> It [Respondent] might have resorted to any one of a number of methods of determining *which of its striking employees would have to wait* because five men had taken permanent positions during the strike. (Emphasis added)

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., June 14, 1968.

By director of the Board:

George A. Leet
Associate Executive Secretary

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[1] 171 NLRB No. 175

**UNITED STATES OF AMERICA**
**BEFORE THE**
**NATIONAL LABOR RELATIONS BOARD**

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* * * (Caption Case No. 2399) * * *

* * * (Caption Case No. 25-CA-2450) * * *

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MOTION TO RECONSIDER DECISION AND ORDER

THE MATERIAL ERRORS

On June 13, 1968, the National Labor Relations Board adopted with modifications the Trial Examiner's Decision in Case Nos. 25-CA-2399 and 25-CA-2450 finding that Respondent (1) had *not* violated Section 8(a)(5) of the Act in any of the particulars alleged in the Complaints, (2) had *not* violated Section 8(a)(3) in the various ways alleged, except by refusing to reinstate William Massey and the strikers who sought reinstatement on February 11, 1966, and (3) had *not* violated Section 8(a)(1) of the Act by perpetrating the sundry acts alleged in the Complaints, except by allegedly misinforming employees of their right to reinstatement upon the termination of the strike.

The sole issue of law decided against Respondent pertained to the right to reinstatement of economic strikers who have been permanently replaced. Expressly overruling a long line of decisions, the Board held for the first time that

> . . . economic strikers who unconditionally apply for reinstatement at a time *when their positions are filled by permanent replacements;* (1) remain employees; (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain

his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons. (Emphasis added) (N.L.R.B. Decision at pp. 10-11)

This holding is erroneous for the following reasons:[1]

(1) It is in direct conflict with *N.L.R.B. v. Fleetwood Trailer* Co., 389 U.S. 375 (1967), the very case upon which the Board's decision is expressly based. In *Fleetwood* the Supreme Court held that the fact that permanent replacements occupied the jobs claimed by strikers constituted a legally valid reason for not reinstating the strikers when they sought reinstatement *or thereafter*. The holding in the present proceeding is just the opposite.

(2) The holding is not supported by *N.L.R.B. v. Fleetwood Trailer Co., supra,* although the Board relies on this decision exclusively. In *Fleetwood* the strikers applied for reinstatement on a number of occasions thus evidencing a continuing desire to return to work while in the present proceeding the strikers applied for reinstatement only once and thereafter resumed picketing thus acting in a manner inconsistent with an intention to abandon the strike. Absent a continuing request to return to work, Respondent had no duty to seek out the strikers and offer them reinstatement.

Furthermore, and most importantly, even if the holding of the Board were free from error, which it is not, the remedy which the Board ordered is improper. A reversal of the Board's announced policy in effect at the time Respondent took the actions herein complained of is being applied retroactively to such actions, thereby subjecting Respondent to a back-pay liability which may amount to hundreds of thousands of dollars. A hardship is being imposed upon Respondent "altogether out of proportion to

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[1] Respondent expressly reserves the right to propound additional arguments in opposition to the Board's Decision and Order in later proceedings and to complain of attack additional errors in such Decision and Order in such later proceedings.

the public ends to be accomplished." *N.L.R.B. v. E & B Brewing Co.*, 276 F.2d 594, 600 (6th Cir. 1960)

Respectfully submitted,
CADICK, BURNS, DUCK & NEIGHBORS

By /s/ CHARLES W. CULP

/s/ THOMAS W. SINEX
Attorneys for Respondent

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

---

* * * (Caption Case No. 25-CA-2399) * * *

* * * (Caption Case No. 25-CA-2450) * * *

---

## ORDER DENYING MOTION

On June 13, 1968, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding, and, on June 14, 1968, a correction thereto, adopting, with certain modifications, the findings, conclusions, and recommendations of the Trial Examiner as contained in his Decision of July 14, 1966. The Board, relying in part on the Supreme Court decision in *Fleetwood*[2] held "that economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons," and overruled previous Board cases to the extent that such cases of similar import hold or infer otherwise. The Board, therefore, found, in agreement with the Trial Examiner, that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by terminating the employment status of strikers and discharging them after February 11, 1966, and by filling vacancies by hiring new employees rather than by offering the positions to strikers who applied for reinstatement. The Board ordered, *inter alia,* that the Respondent offer re-

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[1] 171 NLRB No. 175.

[2] *N.L.R.B. v. Fleetwood Trailer Co.,* 389 U.S. 375.

instatement and pay backpay to the individuals whom the Board found were discriminated against by the Respondent.

Thereafter, on July 3, 1968, the Respondent filed a Motion to Reconsider Decision and Order, contending that the Board erred in concluding that its holding was impelled or even permitted by the decision in *Fleetwood,* and that the Board Decision is improper in that revised Board policy is being applied to actions of the Respondent which were lawful at the time taken. It moves that the Board, upon reconsideration, reverse the Decision and Order, or, in the alternative, "revise its order so as to apply the newly announced rule prospectively only."

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Respondent's Motion to Reconsider Decision and Order be, and it hereby is, denied as it contains nothing not previously considered by the Board.

Dated, Washington, D. C., July 12, 1968

By direction of the Board:

George A. Leet
Associate Executive Secretary

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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* * * (Caption Case No. 17,033) * * *

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PETITION TO REVIEW AN SET ASIDE
AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

The Laidlaw Corporation petitions the court to review and set aside the Order of the National Labor Relations Board (hereinafter called "Board") entered June 13, 1968 in proceedings designated on the Board's records as Case Nos. 25-CA-2399 and 25-CA-2450.

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**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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* * * (Caption Case No. 17,033) * * *

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CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:

On July 16, 1968 pursuant to Section 10(f) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 et seq.), The Laidlaw Corporation, instituted the captioned proceeding by filing with this Court a petition to review and set aside an order issued against it by the National Labor Relations Board on June 13, 1968, in a case appearing on the records of the Board as Case Nos. 25-CA-2399 and 25-CA-2450.

Pursuant to Section 10(f) of the Act and Section 15(b) of the Federal Rules of Appellate Procedure, the Board files this cross-application for enforcement of said order.

In support of this cross-application, the Board respectfully shows:

(1) The Petitioner is engaged in business within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this cross-application for enforcement by virtue of Section 10(f) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on June 13, 1968, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Petitioner, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon the Petitioner by sending a copy thereof

postpaid, bearing Government frank, by registered mail, to the Petitioner.

(3) Pursuant to Section 10(f) of the National Labor Relations Act, as amended, and Rule 17(b) of the Federal Rules of Appellate Procedure, the Board is certifying and filing with this Court a list of documents, pleading, and materials comprising the entire record of the proceeding before the Board as well as the findings and order of the Board in Case Nos. 25-CA-2399 and 25-CA-2450.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this cross-application and transcript to be served upon the Petitioner and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony, and evidence, and the procedings set forth in the transcript and upon the Order made thereupon a judgment enforcing in whole said Order of the Board, and requiring the Petitioner, its officers, agents, successors, and assigns to comply therewith.

/s/ Marcel Mallett-Prevost
MARCEL MALLET-PROVOST
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 23rd day of August, 1968

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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1969

No. 1025

THE LAIDLAW CORPORATION,
*Petitioner,*
vs.
NATIONAL LABOR RELATIONS BOARD.

## PETITION FOR A WRIT OF CERTIORARI
## to the United States Court of Appeals
## for the Seventh Circuit

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1969

No.

THE LAIDLAW CORPORATION,
*Petitioner,*
vs.
NATIONAL LABOR RELATIONS BOARD.

## PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit

The Laidlaw Corporation petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit insofar as it enforced that portion of the National Labor Relations Board's order providing backpay for certain of the Company's employees.

### OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra,* pp. 1-47) is reported at 414 F.2d 99. The Company's petition for rehearing was denied on Sep-

tember 2, 1969. The findings of fact, conclusions of law and order of the Board (A. 23-94)[1] are reported at 171 NLRB No. 175.

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## JURISDICTION

The judgment of the court of appeals was entered on September 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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## QUESTIONS PRESENTED

1. Whether that portion of the National Labor Relations Board's order requiring the Company to pay backpay to certain striking employees is arbitrary and capricious and an abuse of the Board's discretion;

2. Whether the Company was unlawfully denied the right to a hearing.

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## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix C (*infra*, p. 50).

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[1] "A." refers to the portion of the record containing the formal papers and the decision and order of the Board printed as an appendix to the briefs in the court of appeals and filed with this Court as an Appendix to the Petition. "E." references are to portions of the transcript and exhibits reproduced and filed in the court of appeals.

## STATEMENT

### A. The Board's Findings of Fact

Petitioner, the Laidlaw Corporation, is an Indiana corporation which maintains a plant at Peru, Indiana for the manufacture and sale of wire and related products (A. 24). Since 1962, Laidlaw has recognized the Union[2] as the exclusive bargaining representative of its production and maintenance employees at the Peru, Indiana plant (A. 25). Under the terms of a collective bargaining agreement signed by the parties on December 14, 1964, the Company and the Union each had the right to require the other to negotiate from December 14, 1965 to January 13, 1966 with respect to the minimum hourly wage rate of employees covered by the agreement (A. 25, E. 246-247). The agreement further provided that the Union could strike during the wage reopener period (E. 248-250).

In the Fall of 1965 the Union reopened the subject of wages under the agreement, and collective bargaining sessions were held in December, 1965 and January, 1966 (A. 36-40). The parties' failure to come to an agreement on the wage issue resulted in a strike against the Company on January 12, 1966 (A. 41).

On January 11, after having received notification of the Union's intention to strike on the following day, the Company's Plant Manager, Jack Johnston, spoke to approximately 75 employees in the plant cafeteria. Johnston read to the employees a speech which had been prepared by the Company's attorney

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[2]Local 681, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO.

(A. 67, E. 179-181, 242). In addition to informing the employees that the Company did not desire a strike, Johnston told them that

> "If you do go on Strike and the Company hires a replacement for you you *Lose Forever* your right to employment by this Company."

On February 11, 1966, a month after the strike had begun, union representative Jack Rains and approximately 40 of the 70 striking employees went to the plant (A. 59). During a meeting with Plant Manager Johnston, Rains applied for unconditional reinstatement on behalf of all the strikers. The employees present also submitted individual applications for reinstatement (A. 59). After consulting the Company's attorney, Johnston returned with a statement which he read to the union representative and the employees, informing them that many of the strikers "have been permanently replaced and are not entitled to reinstatement," and that those whose jobs were not occupied by permanent replacements "will be notified on or before Monday [February 14] to return to work" (A. 59). Almost immediately thereafter the Company offered reinstatement to five employees whose jobs were not occupied by permanent replacements as of February 11, 1966 (A. 64). These were the only employees whose jobs had not been filled by permanent replacements as of that date (A. 64).

After reinstating the five employees to their positions, the Company treated all striking employees who had been permanently replaced on an equal basis with new applicants for employment (A. 60). The

Company continued to advertise for new employees as it had done continuously throughout the strike (A. 44). Thus, if a position became available through the departure of a permanent replacement, the Company offered that position to any striking employee from whom it had that day received a request to return to work (A. 60).[3] In the absence of such requests, the job was filled by a new employee. This procedure resulted in the reinstatement of ten strikers on and after February 11, and offers of reinstatement to eight additional strikers[4] who refused them.

On February 16, 1966 and thereafter, the Company, in accordance with Indiana law,[5] sent termination notices to the Indiana Employment Commission, with copies to the strikers, giving the date of application for reinstatement as the date of separation, and "permanently replaced while on economic strike and no

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[3]In addition to the strikers who submitted individual applications for reinstatement on February 11, the Company received applications after February 11 from sixteen other employees (A. 59).

[4]On February 15, employees Garner, Lemasters, Whitaker, Roberts and Matlock applied for reinstatement (E. 142-144). As there were openings available for all five of these employees (E. 230-232), each of them was offered reinstatement (E. 144). The next day employees Miller, Brown, R. Achey and S. Achey applied for reinstatement. As there were no openings on that day (E. 145-147, 233-235), no offers of reinstatement were made. Employees I. Gochenaur, Phillipy and Ridenour applied for reinstatement on February 18, 1966. As the Company had four openings, all of these employees were offered reinstatement (E. 147-151). On February 21, 1966, employees Loe, E. Gochenaur, Noble and Stapleton asked for reinstatement. As there were four openings that day (E. 151, 153), they were all offered reinstatement. No employees applied for reinstatement after February 21, 1966 (E. 154). Three strikers had been reinstated prior to February 11. In all, the Company offered reinstatement to 26 strikers (A. 60).

[5]Indiana Employment Security Act, Sec. 52-1542a(e).

job available on xxx date of application for reinstatement" as the reason for unemployment. On Monday, February 21, a group of 16 employees who had been reinstated left their jobs and joined the employees who had remained on strike after February 11 (A. 60-61). The pickets carried signs stating that the Union was "on strike protesting unfair labor practices" (A. 61).

**B. The Board's Conclusion and Order**

The Board found that the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers to their former or substantially equivalent positions after February 11, 1966 as vacancies arose among the permanent replacements whom the Company had hired during the strike. On the basis of this finding, the Board further found that from and after February 21, 1969, the strike was converted into an unfair labor practice strike. Alternatively,[6] the Board found that the Company's refusal to reinstate certain economic strikers after February 11, 1969 was discriminatorily motivated and violative of Section 8(a)(3) and (1) of the Act.[7] In reaching its main decision, the Board purported to apply the rationale of this Court's decision in *National Labor Relations Board v. Fleetwood Trailer*

[6]As will appear more fully *infra*, this finding is inseparable from the Board's adoption of a new rule regarding reinstatement of economic strikers who have been permanently replaced which resulted in the foregoing violation of Section 8(a)(3) and (1).

[7]The Board also found that certain remarks of Company officials and a no-solicitation rule violated Section 8(a)(1) of the Act. Other charges of violations of Sections 8(a)(1), (3) and (5) of the Act were dismissed. These findings are not in issue here.

*Co.*, 389 U.S. 375 (1967), and overruled prior Board cases (which had been enforced by the courts) which had held that the Company was *not* obligated to seek out economic strikers who had been permanently replaced before filling vacancies which arose among permanent replacements hired during a strike (A. 91-93).

The Board issued a standard cease and desist order, and ordered the Company to offer immediate and full reinstatement to the employees listed in Appendices C and D of its decision and to make them whole for any loss of earnings they may have suffered as a result of the failure of the Company to reinstate them.

**C. The Decision of the Court of Appeals**

A divided court of appeals upheld the new rule adopted by the Board in this case. The court enforced the Board's order in all other respects, rejecting the Company's claim that the award of backpay in the circumstances of this case was arbitrary and capricious and a denial of due process.

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**REASONS FOR GRANTING THE WRIT**

At the time of the January 12, 1966 strike (and until the Board's decision in this case), Board law provided that a company was not obligated to discharge permanent replacements to make room for returning economic strikers. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S.

333, 345-346 (1938). If, when an economic striker offered to return to work, his job was occupied by a permanent replacement, he was no longer entitled to reinstatement but was entitled *only* to consideration on an equal basis with new applicants for any future openings. See, e.g., *Bartlett-Collins Co.*, 110 NLRB 395, 397-398 (1954), enf'd *sub nom American Flint Glass Workers Union of North America v. National Labor Relations Board*, 230 F.2d 212 (C.A.D.C., 1956), cert. denied, 351 U.S. 988; *Economy Stores, Inc.*, 120 NLRB 1, 6-8 (1958); *Crookston Times Printing Co.*, 125 NLRB 304, 320-321 (1959); *Brown & Root, Inc., et al.*, 132 NLRB 486, 493-494 (1961), enf'd *sub nom National Labor Relations Board v. Brown & Root, Inc.*, 311 F.2d 447 (C.A. 8, 1963). Furthermore, under existing Board rules, economic strikers who conditioned their application for reinstatement on the reinstatement of all economic strikers were not considered to have made a valid unconditional application for reinstatement. *Tex-Tuft Products, Inc.*, 134 NLRB 1628, 1631 (1961); *American Optical Co.*, 138 NLRB 681, 682 (1962).

In the instant case, the Board overruled its prior line of cases (A. 91-93) and held for the first time that an employer has a continuing obligation to seek out permanently replaced economic strikers *after the departure of permanent replacements* and to offer the strikers an opportunity to return to their jobs unless, in the meantime, the employees have obtained regular and substantially equivalent employment elsewhere (A. 93). The court below rejected the Company's claim that under the circumstances of this

case the Board's award of backpay was arbitrary and capricious. The court concluded that:

> "The importance of protecting the statutory rights of Laidlaw's employees outweighs the fact that the Company may have relied on a prior rule or policy." (Appendix A, *infra*, p. 19).

The court agreed with a statement made in the Board's brief that:

> "Unless the disadvantaged strikers are compensated, they will have been penalized for exercising statutorily protected rights and the effect of discouraging future such exercises will not be completely dissipated. In these circumstances, it was not arbitrary or capricious for the Board to conclude that complete vindication of employee rights should take preference over the employer's reliance on prior Board law."

1. The Company submits that the Board's award of backpay in this case, based upon the overruling of a prior line of cases and a pronouncement of a new rule with regard to an employer's obligation to offer reinstatement to permanently replaced economic strikers, was arbitrary and capricious and an abuse of the Board's discretion.[8]

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[8]The propriety of the Board's rule as such, and those portions of the award which require the Company to post cease and desist notices and to offer reinstatement to former economic strikers, is not challenged. We submit, however, that the Board's new rule cannot properly be called a logical extension of the *Fleetwood Trailer Co.* decision, *supra*. In *Fleetwood Trailer Co.* this Court held only that an employer could not seize upon a strike-related temporary slowdown in production to deny reinstatement to an economic striker on the alleged ground that his job had been abolished. 389 U.S. at 378.

The legality of retroactive adjudicatory administrative orders was considered at length in *Securities and Exchange Commission v. Chenery Corp., et al.*, 332 U.S. 194 (1947). There the Securities and Exchange Commission had denied approval to a reorganization plan filed by a company subject to the Public Utility Holding Company Act of 1935, 49 Stat. 803, because of management trading in the company's securities during the reorganization. The company argued that while the Commission was entitled to promulgate general rules relating to future utility reorganizations, it could not apply those rules retroactively to the reorganization under consideration. This claim was rejected by this Court (332 U.S. at 203):

> "Hence we refuse to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct. Cf. Federal Trade Commission v. R. F. Keppel & Bro., 291 U.S. 304, 78 L.Ed. 814, 54 S.Ct. 423. That such action might have a retroactive effect was not necessarily fatal to its validity. Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned

by law. See Addison v. Holly Hill Fruit Products, 322 U.S. 607, 620, 88 L.Ed. 1488, 1497, 64 S.Ct. 1215, 153 ALR 1007."

*Chenery* concerns the ability of an administrative agency to make a rule in a case of first impression applicable to the parties in the case in which the rule is promulgated. It does not, however, deal with the propriety of retroactive application of a *change in a long-standing prior rule* of an administrative agency, particularly where reliance has been placed on the prior rule, and where the administrative agency has the authority to promulgate rules in accordance with the Administrative Procedure Act, 5 U.S.C. 553. Cf. *National Labor Relations Board v. Wyman-Gordon Co.* . . . U.S. . . ., 89 S.Ct. 1426 (1969). This problem is squarely presented by the instant case, and warrants review by this Court.

As the scope and caseloads of administrative agencies broaden, and as agencies persist in formulating general rules by the process of adjudication rather than by rule-making,[9] the question of the public's right to rely upon rules of decision of administrative agencies in guiding their conduct becomes paramount. In this case, Laidlaw Corporation, in determining what course of conduct to follow with regard to economic strikers who applied for reinstatement after they had been permanently replaced, expressly relied on Board policy which had remained constant for a number of years.

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[9]See Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729 (1961).

While the Company does not oppose the Board's efforts to protect employees in the exercise of their statutory rights, and for that reason does not object to being directed to offer reinstatement to the economic strikers, it is submitted that a retroactive award of backpay which could possibly total almost half a million dollars works a hardship on the Company out of all proportion to the public ends to be accomplished in making the new rule retroactive. Cf. *Securities and Exchange Commission v. Chenery, supra,* 332 U.S. at 203. This is especially true where the Company's conduct was lawful under Board precedent existing at the time of the strike.[10] Moreover, the public end to be served by retroactivity is minimal at best. When the employees struck in January, 1966, they had no expectation of a guarantee of reinstatement or backpay following the departure of their permanent replacements. The economic battle was joined under the rules of law which obtained in 1966, and neither the employees' nor the public's interest requires the retroactive application of the Board's new rule of law to a strike undertaken when different standards prevailed. The employees would be in no worse position than they were in at the time

[10]The Board's alternative finding that the Company's failure to reinstate strikers was discriminatorily motivated cannot be treated separately from its new rule. That finding is based upon the Company's continuation of advertising for, and hiring of, new employees as well as strikers (which it had a lawful right to do); the termination notices sent to the Indiana Employment Commission (which it had an obligation to do); and one statement of the plant manager (A. 67). Thus, the only real evidence in support of the finding of discrimination was the Company's scrupulous adherence to Board law as it existed in 1966 *rather than in 1968.*

of the strike. Indeed, because the Company has not challenged the reinstatement portion of the Board's order, they have received a material benefit from the change in the law. To add to that benefit an overwhelming award of backpay, in the face of the Company's express reliance on long-established Board policy, constitutes agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" within the meaning of 5 U.S.C. 706(2)(A).

2. The question raised above has not, to our knowledge, been considered by this Court. It has, however, been considered by a number of lower courts, and the results are conflicting as well as confusing. Thus, while there is authority for the proposition that the Board can make certain changes in its rules retroactive,[11] there are other decisions which squarely condemn retroactive changes in agency rules,

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[11] *National Labor Relations Board v. Baltimore Transit Co.*, 140 F.2d 51, 55 (C.A. 4, 1944), cert. denied, 321 U.S. 795 (change in jurisdictional standards); *National Labor Relations Board v. Kobritz*, 193 F.2d 8 (C.A. 1, 1951) (change in jurisdictional standards); *National Labor Relations Board v. National Container Corp.*, 211 F.2d 525 (C.A. 2, 1954) (change in manner of computation of backpay); *Optical Workers Union v. National Labor Relations Board*, 227 F.2d 687, 691 (C.A. 5, 1955), cert. denied, 351 U.S. 963 (change of jurisdictional standards); *National Labor Relations Board v. Pease Oil Co.*, 279 F.2d 135 (C.A. 2, 1960) (change of jurisdictional standards); *National Labor Relations Board v. Guernsey-Muskingum Electric Coop, Inc.*, 285 F.2d 8 (C.A. 6, 1960) (change in jurisdictional standards); *Leedom v. IBEW*, 278 F.2d 237, 243 (C.A.D.C., 1960) (change of contract bar rules); *National Labor Relations Board v. APW Products Co.*, 316 F.2d 899 (C.A. 2, 1963) (change in tolling of backpay award); *National Labor Relations Board v. Local 138, International Union of Operating Engineers*, 380 F.2d 244 (C.A. 2, 1967) (change in post-election objection rules).

especially where the party against whom the order is made has expressly relied upon such rules.[12] The position of courts which have denied retroactive effect to changes of existing rules is best exemplified by the opinion of Judge Friendly in *National Labor Relations Board v. Majestic Weaving Co., supra.* As Judge Friendly noted (355 F.2d at 860):

> "Although courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct, a decision branding as 'unfair' conduct stamped 'fair' at the time a party acted, raises judicial hackles considerably more than a determination that merely brings within the agency's jurisdiction an employer previously left without [citation omitted], or shortens the period in which a collective bargaining agreement may

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[12]See for example, *National Labor Relations Board v. Guy F. Atkinson Co.*, 195 F.2d 141 (C.A. 9, 1952) (change in jurisdictional standards); *National Labor Relations Board v. International Brotherhood of Teamsters, et al.*, 225 F.2d 343, 348 (C.A. 8, 1955) (change in rules relating to seniority); *National Labor Relations Board v. Local 176, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 276 F.2d 583 (C.A. 1, 1960) (change in hiring hall rules); *National Labor Relations Board v. E. & B. Brewing Co.*, 276 F.2d 594, 600 (C.A. 6, 1960), cert. denied, 366 U.S. 908 (change in hiring hall rules); and *National Labor Relations Board v. Majestic Weaving Co.*, 355 F.2d 854 (C.A. 2, 1966) (change in rule concerning grant of exclusive bargaining status to non-majority union conditioned on attainment of majority prior to execution of contract). Cf. *Pedersen v. National Labor Relations Board*, 234 F.2d 417, 419 (C.A. 2, 1956). See also, *Arizona Grocery Co. v. Atchison, T. & S.F.R. Co.*, 284 U.S. 370 (1932); *Helvering v. Griffiths*, 318 U.S. 371 (1943); *Greene v. United States*, 376 U.S. 149 (1964); *Klein v. Securities and Exchange Commission*, 224 F.2d 861, 864 (C.A. 2, 1955); *Lesavoy Foundation v. Commissioner of Internal Revenue*, 238 F.2d 589, 594 (C.A. 3, 1956); *Pacific Molasses Co. v. Federal Trade Commission*, 356 F. 2d 386 (C.A. 5, 1966); *City of Chicago v. Federal Power Commission*, 385 F.2d 629, 637 (C.A.D.C., 1967) cert. denied, 390 U.S. 945.

bar a new election [citation omitted], or imposes a more severe remedy for conduct already prohibited [citation omitted]. And the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established [citations omitted].

"It must be recognized that 'every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency,' and that, generally speaking, 'the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency,' *SEC v. Chenery Corp., supra,* 332 U.S. at 203, 67 S.Ct. at 1580. But the problem of retroactive application has a somewhat different aspect in cases not of first but of second impression, where an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry that it regulates. As a result of the nature of the task Congress has confided to the agencies and the vagueness of the directions it has given, they are, and ought to be, much likelier to engage both in new departures and in alterations than courts with their more limited 'molecular motions,' *Southern Pacific Co. v. Jensen,* 244 U.S. 20, 5, 221, 37 S.Ct. 524, 61 L.Ed. 1086 (1917) (dissenting opinion of Mr. Justice Holmes); and this makes it peculiarly important for them to take full advantage of their power to act prospectively, whether by rule-making or adjudication."

An analysis of the cases cited in the two footnotes above makes it clear that the lower courts are in need of guidelines to be applied to retroactive changes in existing administrative agency rules. The proliferation of administrative agencies is certain to result in increasing changes in agency regulations, thus insuring the recurrence of the problem raised in this case. Because of the difficulties of the lower courts in arriving at a satisfactory method of evaluating retroactive rule changes by administrative agencies, and the increasing reliance which individuals and companies must place on agency rules and regulations, it is submitted that this case is an appropriate one for this Court to review the entire field of retroactive application of changes in agency rules.

3. Assuming *arguendo* that the guidelines established by the Court in the *Chenery* case with regard to the retroactivity of new administrative agency rules is applicable to cases of *changes* in agency rules, we respectfully submit that the National Labor Relations Board failed to exercise its administrative discretion in determining whether or not to make its award of back pay.

*Chenery* held that when an agency is determining the propriety of giving retroactive effect to a change of rules (332 U.S. at 203):

> ". . . such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill-effect of the retroactive application of a new standard, it is not the type of retro-

> activity which is condemned by law [citation omitted]."

Therefore, before the Board could determine to apply its new rule with regard to economic strikers retroactively to the Laidlaw Company in this case, it must first have performed the balancing task required by the Court in *Chenery*. Whether or not the Board has done so in this case cannot be determined from the record. So far as the record shows, the Board's decision and order was entered against the Company without the slightest consideration being given to the "ill-effect of the retroactive application of a new standard" which would be caused to the Company in this case. Moreover, there is no indication that the potential harm which would be caused the Company was balanced against the public good which the Board must find would result from the application of a retroactive backpay award. See A. 91-93.

As noted *supra,* p. 9, the court of appeals, at the urging of the Board in its brief, adopted a rationale justifying the Board's retroactive award. In so doing, the court of appeals exceeded the scope of review of administrative decisions, for, as this Court noted in *Burlington Truck Lines, Inc. v. United States, et al.*, 371 U.S. 156, 168 (1962), ". . . courts may not accept appellate counsel's post hoc rationalizations for agency action . . ." And, we submit, this is just such a case. For the court below could not have properly reviewed the Board's decision because the basis and reasons for the Board's retroactive application of the new rule appear nowhere in its decision. This Court

held in *National Labor Relations Board v. Metropolitan Life Insurance Company,* 380 U.S. 438, 442-444 (1965):

> "On the other hand, due to the Board's lack of articulative reasons for the decisions in and distinctions among these cases [footnote omitted], the Board's action here cannot be properly reviewed. When the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it' [footnote omitted]. Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 197, 85 L.Ed. 1271, 1284, 61 S.Ct. 845, 133 ALR 1217. See Burlington Truck Lines v. United States, 371 U.S. 156, 167-169, 9 L.Ed.2d 207, 215, 216, 83 S.Ct. 239; Interstate Commerce Commission v. J-T Transport Co., 368 U.S. 81, 93, 7 L.Ed.2d 147, 156, 82 S.Ct. 204. Although Board counsel in his brief and argument before this Court has rationalized the different unit determinations in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, the integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action . . . .' Burlington Truck Lines v. United States, supra, 371 U.S. at 168, 9 L.Ed.2d at 216; see Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194, 196, 91 L.Ed. 1995, 1999, 67 S.Ct. 1575. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review.

> Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' Securities & Exchange Commission v. Chenery Corp., supra, 332 U.S. at 196, 91 L.Ed. at 1999."

See also, *Securities and Exchange Commission v. Chenery Corporation,* 318 U.S. 80, 92-95 (1943). In the absence of any indication from the National Labor Relations Board that it has exercised the discretion accorded it by Congress in the manner specified by this Court in *Chenery, supra,* the case was not ripe for review in the court below. Hence, we submit the Petition should be granted and the case remanded to the National Labor Relations Board so that the Board can properly exercise its discretion and supply the reasons for its decision on this issue. See *National Labor Relations Board v. Metropolitan Life Insurance Co., supra,* 380 U.S. at 444.

4. Even if it could be determined that the Board had, in fact, exercised its administrative discretion, it must be noted that the Company has been given no opportunity to introduce evidence bearing on the harm which would be caused by a retroactive application of the Board's back pay award. In the absence of any evidence from the Company, the Board could not have reached a decision based upon the facts of this case. Indeed, if the Board has attempted to exercise its discretion in the absence of such evidence, its decision can be based only upon

mere conjecture. By deciding this vital issue without affording the Company an opportunity to submit evidence, the Board has clearly acted contrary to the Congressional mandate of 5 U.S.C. 554(c)(1) and 5 U.S.C. 706(2)(D). Therefore, we respectfully submit that the Petition should be granted so that the Company can have a hearing on the issue at hand.[13]

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## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
December 19, 1969.

Respectfully submitted,
ALLEN W. TEAGLE,
WESLEY J. FASTIFF,
ROBERT M. LIEBER,
*Attorneys for Petitioner.*

LITTLER, MENDELSON & FASTIFF,
*Of Counsel.*

**(Appendices Follow)**

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[13]There can be no question as to the Board's authority to order a further hearing. See Section 10(e) of the Act, 29 U.S.C. Section 160(e), Appendix "C," *infra*, p. 50.

## Appendix A

In the United States Court of Appeals
for the Seventh Circuit

SEPTEMBER TERM, 1968—APRIL SESSION, 1969

No. 17,033.

THE LAIDLAW CORPORATION,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

JULY 28, 1969

On Petition To Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Before MAJOR, *Senior Circuit Judge*, KILEY and SWYGERT, *Circuit Judges*.

SWYGERT, *Circuit Judge*.

The principal question presented in this review is whether the rule enunciated in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), should be applied to the facts in this case.

The Laidlaw Corporation is engaged in the manufacture of wire and related products. It petitioned this court to review an order of the Labor Board issued June 13, 1968. The Board cross-petitioned for the enforcement of its order.

The violations of the National Labor Relations Act which the Board found were: section 8(a)(1) by threatening to deny employment forever to its employees if they struck and were replaced and by maintaining an invalid no-distribution rule; and section 8(a)(3) and (1) by failing and refusing to offer a replaced striker full reinstatement to his former job, by terminating the employment status of a large number of other replaced strikers following their unconditional offer to return to work, and by later failing and refusing to offer them reinstatement.

The factual background giving rise to these violations is as follows. In June 1962, as a result of a representation election, the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO, was certified as the collective bargaining representative of Laidlaw's production and maintenance employees at its Peru, Indiana plant. Since then Laidlaw and the union have operated under successive collective bargaining agreements, the most recent covering the period December 14, 1964 to December 13, 1966. The contract contained a provision for mid-term negotiations with respect to wages. Such negotiations, if requested by either party, were to take place during the period from December 14, 1965 to January 13, 1966.

In October and November 1965 the union notified Laidlaw of its desire to reopen the contract pursuant to the wage-reopen clause in order to renegotiate wages. Thereafter the parties met at various times in December 1965 and January 1966. At a meeting on January 7, 1966 the company refused to offer any

wage increase, asserting that it had lost money in previous years and wanted to see whether its operations, which had been profitable for the first two months of its current fiscal year, would continue to show a profit for the next three months. The company said that it would agree to new wage negotiations in three months if the union would abandon its demands.

On January 8, 1966, the employees rejected the company's proposal and voted to strike in support of their demand for a wage increase.

On January 11 the union sent the company a telegram stating that the strike would begin at noon on January 12. That afternoon, plant manager Johnston read a prepared speech to about seventy-five of the company's employees. He said in part:

> The Company has decided to continue to operate through the strike, and in doing so will provide work for all employees who decide to work and will hire new employees to replace those on strike.
>
> Mr. Wentz has told those of you at the Union meeting last Saturday that our attorney Mr. Duck lied to you on last Friday when he told you that under Federal Law if you do go on strike and the Company hires a replacement for you you *Lose Forever* your right to employment by this company. I want to assure you that such *IS* the law. Mr. Duck told you the absolute truth. Let me suggest that before you take action that can seriously and permanently effect your future here, you check with any lawyer of your own choice or with the Indianapolis Office of the National Labor Relations Board. You will find Mr.

> Wentz has misled you and Mr. Duck has told you the absolute truth. (Emphasis in original text.)

The following day, seventy of the company's ninety-nine employees went on strike. Picket lines were immediately set up with signs reading, "Local 681 on strike for fair wages."

William Massey, an employee of the company since June 1961, was one of the strikers. On February 14 he telephoned his supervisor and asked to return to work and was told to report the next morning. When Massey arrived, he was informed by the employment manager that his job was "filled" at that time as were the jobs of all male employees. He was also told that if the company were to reemploy him, it would be as a "new employee" at the minimum contract starting wage. Three days later the employment manager telephoned Massey and asked him to return to work. Massey was assured that he would receive the same pay he was earning when he went on strike, but that he "would have to be reinstated as a new employee." Later that afternoon, Massey spoke with the plant manager about the loss of his accrued seniority and vacation rights. He was told that he would be denied his seniority and vacation pay. Massey refused to return to work under these circumstances and continued to strike.

During the strike, plant manager Johnston told foreman Bridges that they should replace the strikers "as fast as we can" and to get rid of the employees with the most seniority because they were the "trouble-

makers." On February 10 approximately fifty of the striking employees met and voted to abandon the strike and return to work. The following morning about forty strikers appeared at the plant and conveyed their desire for reinstatement. The union representative informed Johnston of the vote taken the preceding day and handed him a sheet of paper which "outlined briefly" the employees' decision to return to work. Additionally, each of the employees present gave to Johnston a printed form letter stating:

> On January 12, 1966, I, along with some 70 other Laidlaw employees, went on strike in protest of certain unfair labor practices.
>
> As of this date I am unconditionally offering to return to work immediately.
>
> Please advise me immediately.

Following a telephone conversation with the company's attorney, Johnston read the following statement to the gathered employees:

> Many of you have been permanently replaced and are not entitled to reinstatement. As soon as we can determine if there are job openings today, those of you for whom there are such openings, if any, will be notified on or before Monday to report to work.

The union representative emphasized to Johnston that although many of the strikers were not present that morning, "our unconditional offer to return did apply to all of the members of the local union."

Following this meeting with the employees, the company determined that, as of February 11, all but

five of the strikers had been replaced and, hence, only five employees were needed to bring the work force up to its prestrike level. On February 11 five of the striking employees were notified by telegram of the vacancies and offered reinstatement.

On February 15 the company received five additional requests for reinstatement from striking employees. Again, the company checked its vacancies and determined this time that it had nine openings. Accordingly, it sent employment offers to all five. Four of the five returned to work the next day. The fifth requesting employee made no response. The other four openings were "filled with new hires," whose applications the company had "on file." The new employees also reported for work the next day. In deciding how to fill the remaining four openings, the company gave no consideration to any of the striking employees who had applied for work on February 11 because, according to Johnston, "We are handling this on the basis of the dates they applied for reinstatement," and "if they didn't apply on the right day [the company was not] going to call them the next day, so to speak."

On February 16 the company received four more requests for reinstatement from strikers. At this time, however, the company had no openings, and it therefore, made no offers. On the same day, the company began mailing to the Indiana Employment Security Division printed "termination" notices, setting forth the "date of separation" of each striking employee to whom it had not offered reinstatement, which in each

case was the date on which the company received the striker's request for reinstatement. Each notice stated, "This person permanently replaced while on economic strike and no job available on [date of application for reinstatement]." Copies of these notices were also sent to each affected employee.

On February 18 the company received applications for reinstatement from three more strikers. Johnston again reviewed the company's needs for that day and determined that four jobs were available. The three employees whose applications were received that day were offered reinstatement. Again, none of the strikers whose application for reinstatement had been received on previous days was considered for the additional vacancy; the opening was filled with a new employee.

During the week of February 14 to 18, the employees who were not reinstated continued to picket outside the company's premises, but when the reinstated employees approached the plant to go to work, the picketing employees took the picket line down in order to allow them to enter without having to cross a picket line.

On February 20, a group of approximately eleven employees who had been reinstated or offered reinstatement met with the union representative. These employees protested the company's act of terminating many of the strikers and its failure to reinstate numerous strikers despite job openings. The representative told the employees that they had the right to file unfair labor practice charges based on the termi-

nation of union members' employment and that if they did not wish to return to work, they did not have to do so. The employees then decided that they would "go on strike under the sign of an unfair labor practice strike."

The next day, the picket signs were changed to read, "Local 681 International Brotherhood of Pulp and Sulphite on strike protesting unfair labor practices." After February 21 the company continued to advertise for new employees, as it had done from the beginning of the strike on January 12. From February 12 to March 21, the company hired a total of some fifty new employees. The company made no further offers of employment to any of the strikers.

The Board found that the company violated section 8(a)(3) and (1) of the Act by refusing to reinstate striker Massey when his former job became available unless he agreed to return as a new employee without accrued seniority and vacation rights. The Board also found that the company violated section 8(a)(3) and (1) of the Act by terminating the employment status of strikers whose jobs were held by permanent replacements on the date they applied to return to work. The Board held that, absent substantial business justification, the company was required to offer reinstatement to these strikers as vacancies arose because of the departure of permanent replacements. Alternatively, the Board held that the company did not seek out these strikers as vacancies arose because it sought to penalize them for particiapting in the strike and that such a motive for filling vacancies

with new employees was impermissible under section 8(a)(3) and (1) of the Act.

Laidlaw had posted, distributed to its employees, and otherwise maintained a set of plant rules. "Minor" Plant Rule Number 1 prohibited "Circulating petitions or printed matter of any kind on company premises." A "violation" of this rule subjected the offender to disciplinary warnings and possible dismissal. The Board found that the company violated section 8(a)(1) of the Act by maintaining the unduly broad no-solicitation rule and by threatening employees if they went on strike, they would be replaced and would lose their employment rights forever.

The Board's order requires the company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their section 7 rights. Affirmatively, the company is directed to rescind the invalid no-distribution rule; to offer Massey and the fifty other strikers whose employment was terminated immediate and full reinstatement with back pay from the dates on which the company should have hired them as their jobs became available, with the order of hiring to be determined by departmental seniority; to offer the reinstated employees who resumed striking on or before February 21 immediate and full reinstatement upon their unconditional offer to return to work; and to post the customary notices.

In its decision, the Board held that economic strikers "who unconditionally apply for reinstatement at

a time when their positions are filled by permanent replacements" not only remain employees, but are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment or unless the employer has sustained his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons. In so holding, the Board said that it was following the underlying principle enunciated in both *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), and *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). It noted that the Supreme Court in *Fleetwood* had held that the hiring of new employees at a time when there are outstanding applications for reinstatement from striking employees is presumptively a violation of the Act, regardless of intent, unless the employer demonstrates a "legitimate and substantial business reason" for his failure to hire the strikers. The Board concluded that the situations in *Fleetwood* and the present case are parallel and that the *Fleetwood* rule should be applied against Laidlaw. The Board said: "when job vacancies arose as the result of the departure of permanent replacements, Respondent [Laidlaw] could not lawfully ignore outstanding applications for reinstatement from strikers and hire new applicants. . . ." We agree with the Board's views and its holding.

After the strike ended on February 10 Laidlaw adopted a fixed policy with reference to strikers who sought reinstatement. It considered only those striker-

applicants who applied for reinstatement on the very day vacancies occurred. If there were no vacancies at the time the strikers applied, the company considered the employee status of those striker-applicants as terminated. The company admitted that this was its policy.[1]

In *Fleetwood,* a similar position was asserted by the employer with respect to openings occurring during the time the employer gradually returned to his pre-strike level of production. The Supreme Court unequivocally rejected the contention that the strikers lost their right to reinstatement because no openings were available at the time they asked to return to work. On this point the Court said:

> It was clearly error to hold that the right of the strikers to reinstatement expired on August 20, when they first applied. This basic right to jobs cannot depend upon job availability as of the moment when the applications are filed. The right to reinstatement does not depend upon technicalities relating to application. On the contrary, the status of the striker as an employee continues until he has obtained "other regular and substantially equivalent employment." (29 U.S.C. §152(3).) Frequently a strike affects the level of

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[1]Plant Manager Johnston testified before the trial examiner as follows:

> Q. You felt no obligation whatsoever on the 15th [of February] to fill these other five slots with people who applied just two or three days before that, when they were former employees?
>
> A. We were handling this on the basis of the dates they applied for reinstatement.
>
> Q. If they didn't apply on the right day you weren't going to call them the next day, so to speak? . . .
>
> A. Yes, sir.

> production and the number of jobs. It is entirely normal for striking employees to apply for reinstatement immediately after the end of the strike and before full production is resumed. If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement. This right can be defeated only if the employer can show "legitimate and substantial business justifications." *NLRB v. Great Dane Trailers. NLRB v. Fleetwood Trailer Co.*, 389 U.S. at 380-381.

In defense of its position, Laidlaw contends that permanent replacement of economic strikers constitutes a legitimate and substantial justification for not offering the strikers reinstatement. Once jobs are filled by "permanent" employees during an economic strike, the company maintains that the strikers have no right to reinstatement even though the replacements depart from their jobs. For support of this proposition, the company relies on the *Fleetwood* decision and *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). Its reliance is misplaced.

In *Mackay*, the Supreme Court was faced with a situation where all but five of the employees who had struck for higher wages were rehired after the strike ended. The Board had found the employer guilty of an unfair labor practice because it had failed to reinstate these five strikers, holding that this failure was motivated by antiunion animus. The Supreme Court, in reversing the Ninth Circuit, affirmed the Board. The Court made it clear, however, that the basis of its holding was the employer's antiunion

motivation and that the Act did not require an employer to discharge permanent striker replacements. The Court said that it is not "an unfair labor practice to replace the striking employees with others in an effort to carry on the business"; that the employer retains "the right to protect and continue his business by supplying places left vacant by strikers"; and that the employer "is not bound to discharge those hired to fill the place of strikers, upon the election of the latter to resume their employment, in order to create places for them." 304 U.S. at 345-346. In conclusion, the Court said that so long as the employer was not antiunion motivated, he might resort "to any one of a number of methods of determining which of its striking employees would have to *wait* because [other] men had taken permanent positions during the strike." 304 U.S. at 347. (Emphasis added.)

In *Fleetwood*, the Supreme Court said that "unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." 389 U.S. at 378. The Court went on to observe:

> In some situations, "legitimate and substantial business justifications" for refusing to reinstate employees who engaged in an economic strike have been recognized. One is when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations. *Id.* at 379.

The justification for not discharging replacements in order to reinstate strikers, found in *Mackay* and mentioned in *Fleetwood,* is the need of the employer to assure permanent employment to the replacements so that the necessary labor force can be obtained to maintain operations during a strike. But such a justification is not present in the instant case. There is no question about the retention of the replacements who were hired during the strike on a permanent basis. The only question is whether the strikers are to be considered employees after the strike, having rights to reinstatement if the replacements depart from their jobs. The legitimate business reason for not discharging replacements in order to reinstate strikers, mentioned in *Mackay* and *Fleetwood,* did not authorize denying the Laidlaw strikers reinstatement after the replacements had for one reason or another departed from their jobs subsequent to the strike's termination. Although there is a "legitimate and substantial business justification" for requiring replaced economic strikers to wait for reinstatement until a vacancy occurs in the labor force, no justification was advanced by Laidlaw for its decision to consider the employment status of striker-applicants terminated if, on the day they applied for reinstatement, their former positions were still occupied by permanent replacements.

Laidlaw argues that the Board's decision "creates in perpetuity a vested interest of an employee in the job, or any substantially equivalent job, he held when he first went on strike." It asks: "When does a striker's right to reinstatement expire, if ever?" The

answer to this argument is that here the employer refused to consider reinstatement only days after the strikers applied and vacancies occurred. In these circumstances, the Board was not required to determine what the impact of the passage of time or inability to notify applicants of vacancies might have on the employer's duty to honor applications for reinstatement.[2]

Laidlaw advances an additional argument why the Board's decision is erroneous. It says that "the Board's decision and order requires it to seek out strikers after February 11, 1966, and offer them reinstatement as jobs become available." This duty, according to Laidlaw, was based on the Board's finding that the strikers' requests to return were continuing in nature. The company argues that this finding is not supported by the record. In our opinion, an examination of the record does support the finding made by the Board.

The strikers not only applied for reinstatement through their union representative; they applied individually through form letters.[3] Moreover, they continued to picket at the company's plant. Finally, a week after the wage-demand strike had ended, the

[2]We do not view the employer's duty to seek out replaced economic strikers to be a severe burden in practice. "Employers, who presumably retain the addresses and phone numbers of the strikers, should not find it overly burdensome to give them notice that a position has fallen vacant." 82 *Harv. L. Rev.* 1777, 1779 (1969).

[3]The union representative's request was sufficient to constitute an offer on behalf of each striker. *NLRB v. Brown & Root, Inc.*, 203 F.2d 139, 147 (8th Cir. 1953).

reinstated strikers joined the picket line with signs expressly protesting the company's failure to offer reinstatement to their fellow strikers. The company could not possibly have entertained any reasonable doubts that the strikers wanted their jobs back.

But Laidlaw argues that since the strikers' requests for reinstatement on February 11 stated, "I am unconditionally offering to return to work immediately," the use of the word "immediately" meant now, at this moment, and not some time in the future. Therefore, it says the Board was wrong in inferring that the demand for reinstatement was a continuing one. We are not impressed by this argument. The use of the word "immediately" was reasonably intended to mean that the striker-applicant was ready to go to work at the time he applied for reinstatement and thereafter.[4]

The Board based its finding that section 8(a)(3) and (1) was violated on alternative grounds. Not only did the Board hold that, regardless of Laidlaw's motivation, the company unlawfully discriminated against the strikers when it terminated their employment if there were no vacancies on the very day they applied for reinstatement, but the Board also held that Laidlaw was discriminatorily motivated when it failed to reinstate the economic strikers when vacancies occurred after February 11.

In its decision, the Board said, "Moreover, we find in accord with the Trial Examiner, that Respondent

[4] The employer argues that our decision in *Sax v. NLRB*, 171 F.2d 769 (7th Cir. 1948), is controlling here. To the extent that case is applicable, we view it as inconsistent with the Supreme Court's subsequent *Fleetwood* decision.

[Laidlaw] was in fact discriminatorily motivated when it implemented its avowed policy of not considering the strikers once they had been replaced or if no vacancy existed on the date of application." This finding is supported by substantial evidence.

Although all the strikers unconditionally asked to return to work immediately, the company continued to advertise for and hire new workers. At the time of the hearing, approximately fifty new workers had been hired to fill vacancies resulting from employee turnover. There is no showing that these fifty openings could not have been filled by striker-applicants.

But more important on this issue was the company's announced attitude toward the union members before the strike. Two days before the strike, foreman Krile told employee Lempke that he had orders to replace the four or five union members in his department. On the day of the strike, plant manager Johnston read the speech to employees in which he emphasized that if they went on strike and were replaced, they would "lose forever" their right to employment by the company. And during the strike, Johnston told foreman Bridges that they should replace strikers "as fast as we can" so that they could get rid of the "troublemakers."

This evidence, when considered with the fact that not one striker who had been replaced was recalled and in light of the company's advertising for permanent unskilled help and its hiring of approximately fifty new employees to fill vacancies, is sufficient to establish a prima facie showing of unlawful motive.

The company failed to offer any reason for preferring new workers as opposed to strikers. For these reasons, the finding of unlawful motive must stand.

We are also convinced that the record, when considered as a whole, warrants the Board's finding that Laidlaw violated section 8(a)(1) of the Act by threatening employees prior to the strike that if they struck they would be replaced and would forever lose their employment rights and by its maintaining a rule which prohibited circulating petitions or printed matter of any kind on company premises.

Laidlaw's final contention relates to the scope of the Board's order. It argues that even if the Board's holding is correct, the imposition of back pay liability is improper because the revised Board policy is being applied to conduct which was lawful at the time the conduct was performed. In support of its position, the company cites section 10(e) of the Administrative Procedure Act which requires the reviewing court to set aside agency action which is arbitrary, capricious or an abuse of discretion. It also refers us to a number of decisions, including *NLRB v. E & B. Brewing Co.*, 276 F.2d 594 (6th Cir. 1960); *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952); and *NLRB v. Local 176, United Brotherhood of Carpenters*, 276 F.2d 583 (1st Cir. 1960). These cases stand for the proposition that in certain situations the Board's adoption of a new rule or policy may not be applied retroactively where its practical effect is to create a hardship on the employer disproportionate to the public ends to be accomplished.

The Board maintains that remedial relief ordered in this case should stand. To justify retroactive relief, it cites the statement of the Supreme Court in *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947), to the effect that retroactivity "must be balanced against the mischief of producing a result which is contrary to a statutory design as to legal and equitable principles."

In the case before us, we believe that the importance of protecting the statutory rights of Laidlaw's employees outweighs the fact that the company may have relied on a prior Board rule or policy. We are in agreement with the statement made by the General Counsel in his brief: "Unless the disadvantaged strikers are compensated, they will have been penalized for exercising statutorily protected rights and the effect of discouraging future such exercises will not be completely dissipated. In these circumstances, it was not arbitrary or capricious for the Board to conclude that complete vindication of employee rights should take precedence over the employer's reliance on prior Board law."

The Board's order will be enforced.

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No. 17033 — THE LAIDLAW CORPORATION v. NATIONAL LABOR RELATIONS BOARD

MAJOR, *Senior Circuit Judge, dissenting.* My great respect for the ability of Judge Swygert to correctly solve difficult problems makes me reluctant to take issue with his well prepared opinion. However, I am

so deeply convinced that the Board's request for enforcement of its order should be denied that I feel obliged to dissent.

In the first place, I agree that an important issue in the case is the effect to be given *National Labor Relations Board v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375. The Board places great emphasis on that case, together with *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333. *Fleetwood* was decided December 18, 1967, almost two years after the occurrence of the events here involved. *Mackay* was decided May 16, 1938, and now for the first time the Board gives it an interpretation radically different from that which it has pronounced in many cases, and from that given it by numerous courts.

More specifically, the Board and Judge Swygert rely upon these cases in support of principles that were unknown in the field of labor law at the time the incidents of the instant case took place. The Board at least tacitly so admits. On brief it states, "It is true that insofar as Brown & Root [132 NLRB 486 (1961)] deals with the subsequent rights of economic strikers whose positions are occupied by permanent replacements on the date they apply for reinstatement, it is contrary to the Board's decision in the case at bar. Indeed, the Board herein overruled that case and others of like import, finding them inconsistent with the Supreme Court's decision in Fleetwood." Again it states, "In the light of Fleetwood, the Board felt called upon to reappraise certain prior decisions which held or implied that economic strikers' employ-

ment status terminated if permanent replacements occupied the job on the date the strikers applied to return to work. See, Brown & Root, Inc., et al., 132 NLRB 486 (1961), enforced, 311 F.2d 447 (C.A.8, 1963); Bartlett-Collins Co., 110 NLRB 395 (1954), affirmed, 230 F.2d 212 (C.A.D.C. 1956), cert. den. 351 U.S. 988; Atlas Storage Div., 112 NLRB 1175, 1180, n. 15 (1955), enforced, 233 F.2d 233 (C.A.7 1956). [In the last named case this court affirmed the Board's decision. To the same effect is our decision in *Sax v. National Labor Relations Board,* 171 F.2d 769, hereinafter quoted.] In the case at bar, the Board unanimously concluded that those cases conflicted with the underlying principles of Fleetwood and the prior decisions were overruled." The Board could have named many other of its own decisions, as well as numerous court decisions, some of which I shall subsequently supply, which it now repudiates.

Assuming, contrary to what I believe, that *Fleetwood* is controlling, my mind rebels against imposing upon an employer a huge penalty for failure to anticipate what the Supreme Court might hold at some time in the future. Moreover, I doubt if this court has reviewed the record in a labor case where the employer under the advice of knowledgeable counsel so scrupulously adhered to the law as taught by the Board and the courts.

Judge Swygert briefly reviews the factual background and the negotiations which took place between the company and the union, which culminated in the strike of January 12, 1966. There is much to be added

to this résumé, particularly in view of the Board's reliance upon the company's alleged anti-union motivation. The fact is, as shown by the Trial Examiner's report, there was not a scintilla of proof of any anti-union motivation by Laidlaw, or even of unfriendly relations between the parties from the time the union was certified as the bargaining agent. The strike, characterized as economic as it no doubt was, could also be described as ill advised in view of the union's failure to prove the charges given as a reason for the strike.

The main charges which the union preferred in justification of the strike were (1) that the company refused to bargain with the union in good faith, and (2) that the company discharged Carmon Brown, vice president and principal bargainer for the union, on December 7, 1965, because of his union activities. The Examiner dismissed both allegations and stated that the general counsel had failed in his burden of proof to show that the company failed to bargain in good faith and, as to Brown, stated, "I am convinced that the record warrants a finding that there is nothing more than suspicion to sustain that allegation."

The Examiner in exonerating the company on the charge of unlawfully discharging Brown, made a statement which, though lengthy, is worth repeating. It is important because it goes far to dispel the Board's premise of the company's anti-union motivation. The Examiner stated:

> "The Respondent and the Union had been operating under collective-bargaining agreements

since 1962. As of the time of Brown's discharge [December 7, 1965], the record discloses no anti-union conduct by Respondent or any unfriendly relations between the parties since the Union's certification in 1962. * * * There is no showing of any union animus directed specifically against Brown or that Brown's Union position and protected Union activities, which admittedly were known to Respondent, were resented or looked upon with disfavor or regarded as being obnoxious. On the contrary, despite Brown's well known Union position and activities, he was promoted to the position of foreman and offered a private tutor, with one half the cost to be borne by Respondent, to bring his educational level up from the 5th to the 8th grade. There is not one iota of evidence to indicate that Brown was made a foreman in order to get him out of the Union and the bargaining unit, and the General Counsel makes no contention to the contrary. Even after he had ceased being a foreman and again became a rank-and-file employee, when it would be reasonable for Respondent to expect him to rejoin the Union and resume his union activities, he was still offered a private tutor, with the full expense to be borne by Respondent, to up-grade his education."

It seems appropriate to consider the numerous incidents which gave rise to the various issues in the case, in the order of their occurrence. This takes me immediately to the Board's finding that the company violated Sec. 8(a)(1) of the Act by its pre-strike threats. The company is entitled to have this issue considered in connection with its splendid, amiable re-

lationship with the union and its employees, as so eloquently portrayed by the Trial Examiner. I take the following facts concerning this issue from the Board's brief.[1]

On January 10, 1966, the company was notified by the union of its intention to strike. On that date foreman Buttram "talked union all day" with employees Durham and Scotten, and asked them "what [they] were going to do" and "when." (The Board and the Examiner overlooked the testimony of Durham that in that conversation Buttram said nothing either for or against the union.) Also on that day foreman Krile told employee Lemke that he did not know that Lemke belonged to the union. Krile added that he "didn't think there was enough that belong to the union that could do any good, there were only four or five in his department that belong to the union and he had orders to replace them." On January 11, foreman Krile told employee Good, "It won't do you a damn bit of good to go [on strike] because by the very next morning every damn one of you will be replaced."

That afternoon, plant manager Johnston read a statement prepared by the company's attorney to about 75 or 80 of the company's employees gathered in the lunchroom. Both the Board and Judge Swygert quote only a part of Johnston's statement. Even at the expense of prolixity, I think it should be set forth in its entirety. It follows:

[1]Some of the statements made by the company's foremen were denied, but the Examiner saw fit to credit the testimony of witnesses offered by the general counsel.

"1. We are advised a Strike by some employees will begin at noon tomorrow.

"2. Under our Contract terms and under Federal Law any of you who want to may go on Strike tomorrow, *BUT ONLY TO OBTAIN A CHANGE IN WAGE RATES.*

"3. Also, under the Contract and the Federal Law, any of you who want to work instead of Striking have a right to work, and the Union cannot interfere with your right to work.

"4. The Mayor of Peru and Police Department have promised to provide ample police protection as needed.

"5. The Company has decided to continue to operate through the strike, and in doing so will provide work for all employees who decide to work and will hire new employees to replace those on strike.

"6. Mr. Wentz has told those of you at the Union meeting last Saturday that our attorney Mr. Duck lied to you on last Friday when he told you that under Federal Law if you do go on Strike and the Company hires a replacement for you you *Lose Forever* your right to employment by this company. I want to assure you that such *IS* the law. Mr. Duck told you the absolute truth. Let me suggest that before you take action that can seriously and permanently effect your future here, you check with any lawyer of your own choice, or with the Indianapolis Office of The National Labor Relations Board. You will find Mr. Wentz has misled you and Mr. Duck has told you the absolute truth.

"7. Please know, it is *not* the desire of this company to have a strike. It is *NOT* the desire of

this company to be forced into the necessity of replacing any of you in your job here with someone new, and so losing you as a part of Laidlaw. It is *NOT* the desire of this company to withhold from you any wage increase or other benefit which the company operations will permit giving. It is *NOT* the desire of this company for you to suffer a loss of income and, perhaps a loss of *job* to discover that what I am telling you is true.

"BUT THAT IS FOR YOU TO DECIDE TOMORROW.

"If any of you have any questions, I will be happy to answer them now, or, if you prefer, you may contact me at your convenience in the office later.

"Thank you."

Both the Examiner and the Board place great emphasis on the phrase, "you *Lose Forever* your right to employment by this company," as showing that Johnston's statement was an incorrect statement of law. This contention is made notwithstanding that the Board and the courts in decisions subsequently cited have held that under such circumstances the employment status is permanently terminated. Any difference between informing an employee that he loses forever his right to employment and telling him that his status as an employee is permanently terminated is not apparent to me.

The Board's contention that these statements were threatening and coercive is bottomed on the premise that the employees were not properly advised as to the law and, therefore, were likely to discourage pro-

tected activity. In support of this contention it cites only *Dayton Food Fair Stores, Inc. v. National Labor Relations Board*, 399 F.2d 153, 154, 155, and *Shattuck Denn Mining Corp. v. National Labor Relations Board*, 362 F.2d 466, 471. Neither case is in point. In both, the court held as unfair a statement by the employer to his employees, that if they participated in a strike their jobs would be automatically terminated.[2]

In my view, Johnston's statement, prepared by his attorney, was a correct statement of law as it pertained both to the employer and the employees. His statement, friendly in nature, was read to a group of employees and certainly was sufficient to dissipate any unfair inference which might be drawn from the isolated statements of the two foremen made to two individual employees. While those statements were phrased in rather crude language, in substance they were the same as contained in Johnston's statement. The fact is that Johnston gave the employees sound advice when he suggested that if they did not believe that he was correctly stating the law they should consult with a lawyer of their own choice or with the Labor Board. If this advice had been followed, the unfortunate situation with which we are here concerned in all probability would never have developed.

I would reject the Board's finding that Johnston's speech and the statements made by supervisory em-

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[2] *Dayton* was decided subsequent to the decision of the Supreme Court in *Fleetwood* and will be referred to later.

ployees were violative of Sec. 8(a)(1) as not supported by substantial evidence.

I shall cite and quote from Labor Board and court decisions which in my opinion completely demolish the Board's contention on this point. These cases are also pertinent to other issues subsequently discussed.

Suppose the employees had gone to the Labor Board for advice, as Johnston suggested. The Board could have responded by citing its own decisions as to the rights of the parties.

In *Brown & Root,* 132 NLRB 486, 494 (1961), the Board held:

> "Like the Trial Examiner, we are constrained to hold the evidence presented by the General Counsel insufficient to establish that vacancies were available when the IAM strikers applied to Respondents for employment. *Moreover, we reject the theory urged by the General Counsel, to the effect that the 13 IAM strikers were entitled to appropriate vacancies as they arose. * * * We hold that Respondents had no obligation to seek out or prefer the IAM Strikers for vacancies which opened up after their application.*" (Italics here and later supplied unless otherwise noted.)

In *Hot Shoppes, Inc.,* 146 NLRB 802 (1964), the employer told the employees on several occasions that in the event of a strike they all would be *permanently* replaced. The employer accepted and processed employment applications with a view to replacing the possible strikers. Ten such employees arrived prior to the commencement of the strike, which began Jan-

uary 4. On January 5, the employer hired seventeen new employees; on January 6, one, and on January 7, fourteen. These new hires filled the company's requirement for employees. The Trial Examiner found, as did the Trial Examiner in the instant case, that the strike was converted into an unfair labor practice strike by the employer's expeditious replacement of the strikers. The Board rejected the Trial Examiner's finding and held (page 805):

> "We, however, disagree with the Trial Examiner's premise that an employer may replace economic strikers only if it is shown that he acted to preserve efficient operation of his business. The Supreme Court's decision in Mackay Radio & Telegraph Company, and the cases thereafter, although referring to an employer's right to continue his business during a strike, state that an employer has a legal right to replace economic strikers at will. We construe these cases as holding that the motive for such replacements is immaterial, absent evidence of an independent unlawful purpose. Therefore, we reject the Trial Examiner's conclusion that the plan to replace the economic strikers here was itself improper and that the strike was converted to an unfair labor practice strike on January 4 by Respondent's implementation of such plan."

In *Texas Boot Mfg. Co.*, 143 NLRB 264, 265 (1963), the Board considered a statement made by an employer to his employees and held that it was not violative of Sec. 8 (a)(1) of the Act. The statement was as follows:

> "So I want you to know that I am not going to close down this factory one day, because of a strike called by the Union. We will continue to operate and hire new workers. This simply means that when I employ new people to cross the picket line to work here at Texas Boot that strikers have lost their jobs *permanently*. I don't think it necessary for me to tell you how many unemployed people there are in Tennessee, Wilson County and Lebanon, who would like to have a job at our plant. We have several hundred applications on file now."

In *James Hotel Co.*, 142 NLRB 761, 764 (1963), the chairman of the company's board told its employees that if "we voted union and had a strike, * * * they could replace us and hire help in our place," and that *"when the strike was over we would come back and have no jobs, because the other people * * * would have our jobs."* The Examiner found that the speech was violative of Sec. 8 (a)(1). The Board reversed the Examiner and held that the remarks were only a statement by the employer of its lawful right to hire replacements in the event of an economic strike.

In *Aladdin Industries, Inc.*, 147 NLRB 1392, 1399 (1964), the company president told the employees that a strike would allow the company to replace the strikers *permanently*, that the company would do this in order to continue operations, and that it had over 1,000 applications for employment in its files at that time. The Board affirmed the Trial Examiner's deter-

mination that the speech did not constitute restraint and coercion and was permitted by Sec. 8 (c) of the Act.

If the employees or the union had consulted a lawyer of their own choice, as Johnston suggested, he would have found at least two decisions of this court which are dispositive of every major contention advanced by the Board in this case. *Sax v. National Labor Relations Board*, 171 F.2d 769, and *Chauffeurs, Teamsters and Helpers "General" Local No. 200 v. National Labor Relations Board*, 233 F.2d 233. In Sax, this court stated (page 771):

> "The employees went on strike under the belief that Ann Killam had been wrongfully discharged. In this they were mistaken, and they cannot visit their mistake upon their employer. The petitioner, as was his right, filled all the vacancies created by the strikers quitting; and at the time the strikers unconditionally applied on March 12 for reinstatement, there were no vacancies. *The strikers had lost their status as employees of the petitioner, and the petitioner had a right to fill their vacancies. National Labor Relations Board v. Mackay Co., 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381. Thereafter the strikers stood at the gate of the petitioner on the same footing as anyone else seeking employment,* with this exception. The petitioner could not refuse to hire them or could not discriminate against them because of their having engaged in the concerted activity of the strike."

This appears to be an appropriate point to refer to the company's refusal to reinstate William Massey.

Judge Swygert has stated the facts relevant to this matter. It is sufficient to note that Massey, one of the strikers, applied for reinstatement on January 14, which was denied by the company on the basis that his job had been filled. On January 18, the job became vacant and the company requested him to return to work at the same pay but as a new employee. Massey refused to go back under those circumstances and continued to participate in the strike. The Examiner found that the company's refusal to reinstate Massey on January 14 was proper but that its refusal to offer him full reinstatement on January 18 was violative of Sec. 8 (a)(3) of the Act. The Board agreed with the Examiner.

Our decision in *Chauffeurs, supra,* on both its facts and the law reads as though it was written for Massey's situation. In that case the Trial Examiner held that an employee named Rodig, an economic striker, was entitled to reinstatement when, three days after his initial application for reinstatement, the employee who had replaced him was injured and could no longer work. The employer advertised for and hired a new employee without notification to Rodig. The Board reversed the Trial Examiner and held that the employer was under no duty to recall Rodig on the date of his replacement's injury or *any time thereafter.* We sustained the Board and in so doing held (page 238):

> "As Rodig's employment was properly terminated when he applied for reinstatement, Atlas' duty toward Rodig did not require seeking him out but merely refraining from discriminating

against him should he request new employment. However, he never made any such request. [Citing *Mackay,* 304 U.S. 333, 346.]"

Thus, the great body of the law fashioned and pronounced by the Labor Board time and again, year in and year out, as well as the decisions of this court, are cast aside solely on the basis of the Supreme Court's decision in *Fleetwood,* decided long after the occurrence of the events in controversy.

This brings me to February 10, 1966, when fifty of the striking employees met and voted to abandon the strike and return to work. The next morning union representative Rains and about forty strikers appeared at the plant, seeking reinstatement. Rains informed plant manager Johnston of the action taken the previous night and handed him a sheet of paper which outlined the decision. Additionally, each of the employees present tendered to Johnston a printed form letter stating, "On January 12, 1966, I, along with some 70 other Laidlaw employees, went on strike in protest of certain unfair labor practices. As of this date I am unconditionally offering to return to work immediately. Please advise me immediately."

Following a telephone conversation with the company's attorney, Johnston read the following statement, "Many of you have been permanently replaced and are not entitled to reinstatement. As soon as we can determine if there are job openings today, those of you for whom there are such openings, if any, will be notified on or before Monday to report to work." At that time Rains emphasized to Johnston that "our

unconditional offer to return did apply to all of the members of the local union."

The company determined that as of February 11, all but five of the strikers had been replaced and, hence, only five employees were needed to bring the work force up to the pre-strike levels. Thus, on that date five of the striking employees were notified by telegram of the vacancies and offered reinstatement. The Examiner found and the Board agreed that at the time of the request for reinstatement on February 11, all strikers' jobs, except five, were filled by replacements who were assured of permanent status and that the company's failure to offer reinstatement to all of the strikers on that date was not violative of the Act.

The Examiner found:

> "When the strikers were not reinstated after their application of February 11, they resumed their strike and picketing activity, with reinstatement obviously becoming the immediate objective of the strike."

The Examiner in his report refers to this strike as a continuation or resumption of the original strike. This is a fallacious idea. There were two separate and distinct strikes, with entirely different objectives. The first, characterized as economic, was legal, and the second was solely for the purpose of forcing the company to reinstate all strikers, irrespective of the fact that all but five of the jobs had been filled by permanent employees. As recognized in the Board's brief, "The Company was thus confronted with a demand by all of the employees for reinstatement."

What was the obligation of the company when confronted with the union demand that all strikers be immediately reinstated to their former positions when all but five of such positions had been filled by permanent replacements? Pronouncements of the Board in effect at that time furnish the answer.

In *Tex-Tuft Products, Inc. and Textile Workers Union of America,* 134 NLRB 1628, 1631, the Board stated:

> "* * * It is well settled that where, as here, economic strikers seek reinstatement, the employer is required to rehire only those who have not already been permanently replaced, and need not rehire even the unreplaced strikers if they condition their application on the reinstatement of those who have been replaced."

In *American Optical Company and United Optical Workers Union,* 138 NLRB 681, the union at the end of an economic strike made an offer on behalf of all twelve of the company's striking employees to return to work as a group. The company had already hired permanent replacements for some of them. The Board stated (page 682):

> "* * * we find it sufficient that, at the time all 12 strikers offered to return to work, the Respondent had hired permanent replacements for *some* of the 12, and that the Respondent therefore was not obliged to take back all 12 strikers."

Under these pronouncements of the Board, the company was under no obligation to comply with the union's demand in whole or in part. However, in keeping with its long established record for fair deal-

ing with its employees and the union, the company decided on a program by which it would reinstate employees on an individual basis as vacancies occurred. For this purpose the company's personnel manager was instructed to check at regular intervals the company's employment status and its need for additional personnel, if any, and to report back to Johnston. This program was followed for several days. The Examiner stated:

> "As previously found, the 16 strikers who were reinstated or offered reinstatement after February 11, 1966, either continued or rejoined the strike because of Respondent's conduct in terminating and *failing to reinstate the remaining strikers after their unconditional request for reinstatement.*"[3]

The company's effort proved fruitless for the reason that individuals refused to accept reinstatement unless the company complied with the union's unconditional demand made on February 11, which was a continuing one, that all strikers be reinstated or none would accept. Reference to a few of the numerous incidents which support this statement and which show the predicament facing the company seems pertinent.

Of the five employees who accepted reinstatement as of February 11, at a time when the Board concedes the company was in compliance with the law, one, Harold Stone, was a witness for the general counsel and testified that he accepted the offer of

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[3]The company asserts that twenty-two strikers were offered reinstatement, but for my purpose the exact number is not important.

reinstatement, worked four days, then with eleven other employees quit and returned to the strike.

On February 15, five striking employees were offered reinstatement and four accepted, including Eva Whitaker who had been active in the union. On February 18, she was discharged, and it was charged by the union that the company was discriminatorily motivated because of her union and strike activity. The Examiner in his report concluded that there was no creditable evidence that her discharge was discriminatorily motivated. This is another of the many reckless charges which the union made but was not able to prove.

Of the three employees who were offered reinstatement on February 16, one accepted, and two refused and rejoined the picket line.

On February 21, the company found it had four vacancies and offered reinstatement to four employees, all of whom refused. Among these was Marilyn Stapleton who testified as a witness for the general counsel that she was offered reinstatement but that "Ann Loe called for four of us" and advised the company that they would not return to work. Instead, she returned to the strike. Ann Loe testified for the general counsel and stated that she refused reinstatement which was offered her and that she notified the company on her own behalf and for three others.

On February 20, eleven employees who were supposed to go to work the following morning met with union representative Rains who told them "that they

had the right to file unfair labor practice charges based on the termination of union members and that if they did not wish to return to work, they did not have to do so." Rains testified that they reached an agreement that "we would remain on strike, go on strike under the sign of an unfair labor strike." He testified that prior to that time the union's picket signs merely read, "on strike," but after that they read, "on strike protesting unfair labor practices." This change, so he testified, went into effect at midnight February 20.

The Examiner found that beginning Monday, February 21, "a group of 16 joined the remaining strikers in the picketing with signs which for the first time stated that the Union was 'on strike protesting unfair labor practices.'"

The Examiner's conclusion that the second strike was an unfair labor practice strike is, if a question of law, erroneous and, if one of fact, clearly without support. Even the union, as shown by the testimony of Rains, did not regard the strike as such until February 21. On a factual situation almost identical with that here, the Examiner in *Hot Shoppes, Inc., supra,* found that an economic strike was converted into an unfair labor practice strike. The Board rejected this finding by the Examiner.

In his report the Examiner stated:

> "A valid unconditional request for reinstatement was made by the Union on behalf of all strikers on February 11, 1966, despite the fact that not all the strikers submitted individual applications at that time or thereafter. As the Board recently

> stated, 'under settled law, it is well within the Union's authority, as the employees' bargaining agent, to make an unconditional application for reinstatement on behalf of the strikers * * *.'"

I do not question the authority of the union to make an application on behalf of all of its members, but its demand on February 11, that the company reinstate all strikers immediately, was illegal because its allowance would have required the company to violate the obligation which it owed to those who had been hired as replacements.

The Examiner found and the Board argues that the demand on February 11 for immediate unconditional reinstatement of all strikers was a continuing application for reinstatement as vacancies occurred.[4] This same contention as to continuity was advanced by the Board in *Sax v. National Labor Relations Board,* 171 F.2d 769, and in response thereto this court stated (page 771):

> "The Board's ruling would dispense with application at the time of a vacancy by the fiction of continuing application. An application when there was no vacancy does occur, in the absence of a clear understanding by the employer that the application was to be considered a continuing one. The record here indicates that the petition had no such understanding."

Assuming, however, that the demand of February 11 was continuing, it was the same demand, that is, that the company reinstate all strikers irrespective

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[4]This argument is based on the novel premise that the word "immediate" means "continuing."

of when or in what manner vacancies occurred. There never was a time when the company was obligated to meet such a demand. At the very most, the company was obligated to reinstate strikers only as vacancies occurred. No such unconditional demand was made by the union or by individual employees. The sole objective of the strike, as in effect found by the Examiner, was to force the company to reinstate all strikers. This explains and is consistent with the action of employees who were offered reinstatement as vacancies occurred. Some of such employees accepted, worked a few days and quit; others refused to accept an offer of reinstatement. Some of such employees joined the picket line, and all had as their objective support for the strike. Thus, the individuals aided and abetted the objective of the union to require the company to reinstate all strikers, or none would accept.

Faced with a dilemma created by a strike to enforce the union's illegal demand, and the attitude of individuals offered reinstatement who refused to work until such demand was met, what was the company to do when vacancies occurred? Surely it was not required to pursue further its good faith attempt to fill vacancies by offering reinstatement to strikers. If it desired to keep its business in operation, as it had a right to do, it pursued the only reasonable, logical and I think legal course open to it, that it, it advertised for and hired new employees.

In *Brown & Root, supra,* under circumstances less favorable to the employer than those here, the Board made a statement which is worth repeating:

> "Moreover, we reject the theory urged by the General Counsel, to the effect that the 13 IAM strikers were entitled to appropriate vacancies as they arose. * * * We hold that Respondents had no obligation to seek out or prefer the IAM Strikers for vacancies which opened up after their application."

This brings me to a consideration of *National Labor Relations Board v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, and *National Labor Relations Board v. Mackay Radio and Telegraph Co.*, 304 U.S. 333. The Board utilizes most of its brief in an attempt to demonstrate that those cases are controlling of the instant situation. The issue in Fleetwood was a narrow one and the facts surrounding it were so widely different from those of the instant case as to make it readily distinguishable. The question was whether the strikers had been permanently replaced on the date they sought reinstatement. The court found that they had not been. In reaching this conclusion, the court held that facts occurring after the date of the employees' application to return to work, of which the company was aware when the employees sought reinstatement, should be taken into consideration in determining whether the employees had been permanently replaced. This is the only issue which was presented to the court, and the only issue which the court decided.

In *Fleetwood,* the employer during the strike had drastically reduced its production and, consequently, the number of its employees. At the end of the strike, six of the strikers applied for reinstatement but,

while the jobs were there, they were not open at the moment; however, the company intended as rapidly as possible to increase production to its pre-strike level and to increase the number of its employees accordingly. Some two months later, instead of offering reinstatement to the six strikers, the company hired six new employees, which the court held was a violation of the Act.

The facts in the instant case are a far cry from those in *Fleetwood*. Here, all during the first and second strikes the company operated its business on a pre-strike level, and the number of its employees remained substantially constant. When the union on February 11 made its unconditional demand that all strikers be reinstated immediately, all but five of their places had been permanently filled and the company immediately reinstated strikers to those places. The Examiner found and the Board agreed that the company was in compliance with the Act at that time. The vacancies in dispute were those caused by the replacement employees leaving their jobs. More than that, the company was confronted with a second strike, the object of which was to require it to reinstate all strikers. Those employees who were reinstated or offered reinstatement refused to work until the strike objective was met. Obviously, the Supreme Court had no such factual situation in *Fleetwood* and, in my view, it is not controlling. Any doubt on this score is resolved by the court's statement in *Fleetwood* (page 379):

> "In some situations, 'legitimate and substantial business justifications' for refusing to reinstate

> employees who engaged in an economic strike have been recognized. *One is when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations.* *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938); *NLRB v. Plastilite Corp.*, 375 F.2d 343 (C.A. 8th Cir. 1967); *Brown & Root*, 132 N.L.R.B. 486 (1961)."

Notwithstanding the court's approval of the cited cases, the Board now rejects its decision in *Brown & Root* and many others of like import. Even though *Mackay* is not mentioned in *Fleetwood* other than above noted, the Board uses *Fleetwood* as justification for an interpretation of *Mackay* which is far different from that given it by the Board and the courts, including this court, in many cases over a period of thirty years.

In my opinion, the Board has misused both *Fleetwood* and *Mackay*. Two cases decided since *Fleetwood* so indicate. The Sixth Circuit, in *Dayton Food Fair Stores, Inc. v. National Labor Relations Board*, 399 F.2d 153, 154, stated:

> "While it is clear that an employer may permanently replace economic strikers, he may not fire a striking employee unless a permanent replacement has been employed. *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375, 88 S.Ct. 543, 19 L.Ed. 2d 614 (1967); *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938). Following an economic strike, employees are entitled to return to their jobs unless 'legitimate and substantial business justifications' dictate otherwise."

The Fourth Circuit, in *National Labor Relations Board v. Stevenson Brick and Block Company,* 393 F.2d 234, 239, stated:

> "As economic strikers, employees are entitled to reinstatement unless permanent replacements have been hired during the strike. If vacancies remain, they must be filled from the ranks of the strikers without anti-union discrimination. *NLRB v. Mackay Radio & Telegraph Co., supra.* In the absence of any evidence or even a claim that the jobs sought by these strikers were still open at the time they requested reinstatement, see *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 88 S.Ct. 543, 19 L.Ed.2d 614 (1968), that portion of the Board's order requiring reinstatement will not be enforced."

Even the Board, in a decision following *Fleetwood, Hill Engineering, Inc.,* 171 NLRB 75 (1968), cites *Mackay* for the statement, "A striking employee retains his employee status and is entitled to reinstatement to his job absent persuasive evidence of permanent replacement."

I need do little more than mention the Board's theory that in any event it is entitled to enforcement of its order on the ground that the company had an anti-union motivation for failing to reinstate the striking employees. In support of this point the Board on brief states, "This alternative holding, unlike the application of Fleetwood discussed, supra, involves no change in the law but rather invokes the traditional doctrine that strikers whose employment ment status has been terminated, like all new applicants for employment, are entitled to be consid-

ered on a nondiscriminatory basis." Cases cited in support of this point, such as *Phelps Dodge Corp. v. National Labor Relations Board,* 313 U.S. 177, and *National Labor Relations Board v. Albritton Engineering Corp.,* 340 F.2d 281, involved situations where the applicant for employment had never been an employee or, if he had, his employment had been terminated. There is no merit in this contention. The short answer to the Board's argument on this point is that not a single striker made application to be rehired: their applications in each instance were for reinstatement. As was stated in *National Labor Relations Board v. Textile Machine Works, Inc.,* 214 F.2d 929, 933, the company "could not be guilty of unfair labor practices in refusing the employees something which they had not in fact asked for." All individual applications for reinstatement were conditional, as previously shown, and any finding that the company had an anti-union motivation relative to the reinstatement of the strikers has no substantial support.

With due regard for our limited scope of review, I would deny in toto the Board's request for enforcement of its order. Even if I could agree that the Board's reliance on *Fleetwood* is proper, I still would refuse enforcement of that portion of its order which awards back pay. I assume, as the Board argues, that it has the power to overrule its previous decisions and "retroactively to determine the merits of the dispute in which the new policy is announced." I further assume, as the Board states, that "there is no absolute rule precluding back pay based upon a retroactive application of a change in the law."

The Administrative Procedure Act, Title 5, U.S.C.A. Sec. 706, which defines our scope of review, provides:

> "The reviewing court shall—
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * *."

The company cites numerous cases in which the courts have refused to enforce the Board's back pay order under circumstances similar to those here. *National Labor Relations Board v. Majestic Weaving Co., Inc.*, 355 F.2d 854; *National Labor Relations Board v. E & B Brewing Co., Inc.*, 276 F.2d 594; *National Labor Relations Board v. Guy F. Atkinson Co. et al*, 195 F.2d 141, and others. As to these cases, the Board on brief states, "And while the Company correctly states that there are cases in which this provision [Administrative Procedure Act] has been applied to prohibit the imposition of remedial measures which are not simply prospective in effect where there had been a retroactive change in the law, the Supreme Court has made it clear that each case must turn on its own facts."

I shall not repeat in detail the facts material to this point. As previously shown, the company under the advice of knowledgeable counsel scrupulously followed the law as taught by the Labor Board and the court. This is particularly true as to the law relating

to the rights of employer and employees when the latter at the end of a strike make application for reinstatement. The Board tacitly, if not expressly, so concedes. Some two years after the events in controversy took place, the Supreme Court rendered its decision in *Fleetwood*. In reliance on that case the Board announced a change in the law. I think it unconscionable under these circumstances that the company should be saddled with a huge back pay order,[5] and this is so whether the Board's reliance on *Fleetwood* was proper or not.

Enforcement of the Board's order means from now on that an employer when faced with the problem of his rights and obligations in a labor dispute cannot safely rely on the advice of counsel, pronouncements of the Labor Board or court decisions for the law by which he should charter his course. Instead, he must be endowed with a power of prophecy sufficiently great to enable him to anticipate that the Board may change the law and make illegal that which was legal.

The Board's order in this respect is, in my judgment, clearly "an abuse of discretion" and, irrespective of all other considerations, I would deny its enforcement.

A true Copy:
Teste:

.....

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

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[5]In oral argument it was stated by counsel for the company that under this order the company might be required to pay as much as $450,000.

## Appendix B

United States Court of Appeals
For the Seventh Circuit

No. 17033

THE LAIDLAW CORPORATION,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

### JUDGMENT

Before: Major, Senior Circuit Judge, Kiley and Swygert, Circuit Judges.

This Cause was submitted to this Court upon a petition to review and set aside, and cross-application for enforcement of, an order of the National Labor Relations Board, dated June 13, 1968, against The Laidlaw Corporation, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on April 30, 1969, and has considered the briefs and transcript of record filed in this case. On July 28, 1969, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order.

On Consideration Whereof, it is ordered and adjudged by the United States Court of Appeals for the

Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and The Laidlaw Corporation, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

It is further ordered that costs shall be taxed against the Petitioner.

* * *

.....

Judge, United States Court of Appeals for the Seventh Circuit

/s/ Roger J. Kiley

Judge, United States Court of Appeals for the Seventh Circuit

/s/ Luther M. Swygert

Judge, United States Court of Appeals for the Seventh Circuit

A True Copy:
Teste:

(Seal) Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

Filed Sept. 25, 1969,
U.S.C.A.—7th Circuit,
Kenneth J. Carrick, Clerk.

## Appendix C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exericse of the rights guaranteed in section 7;

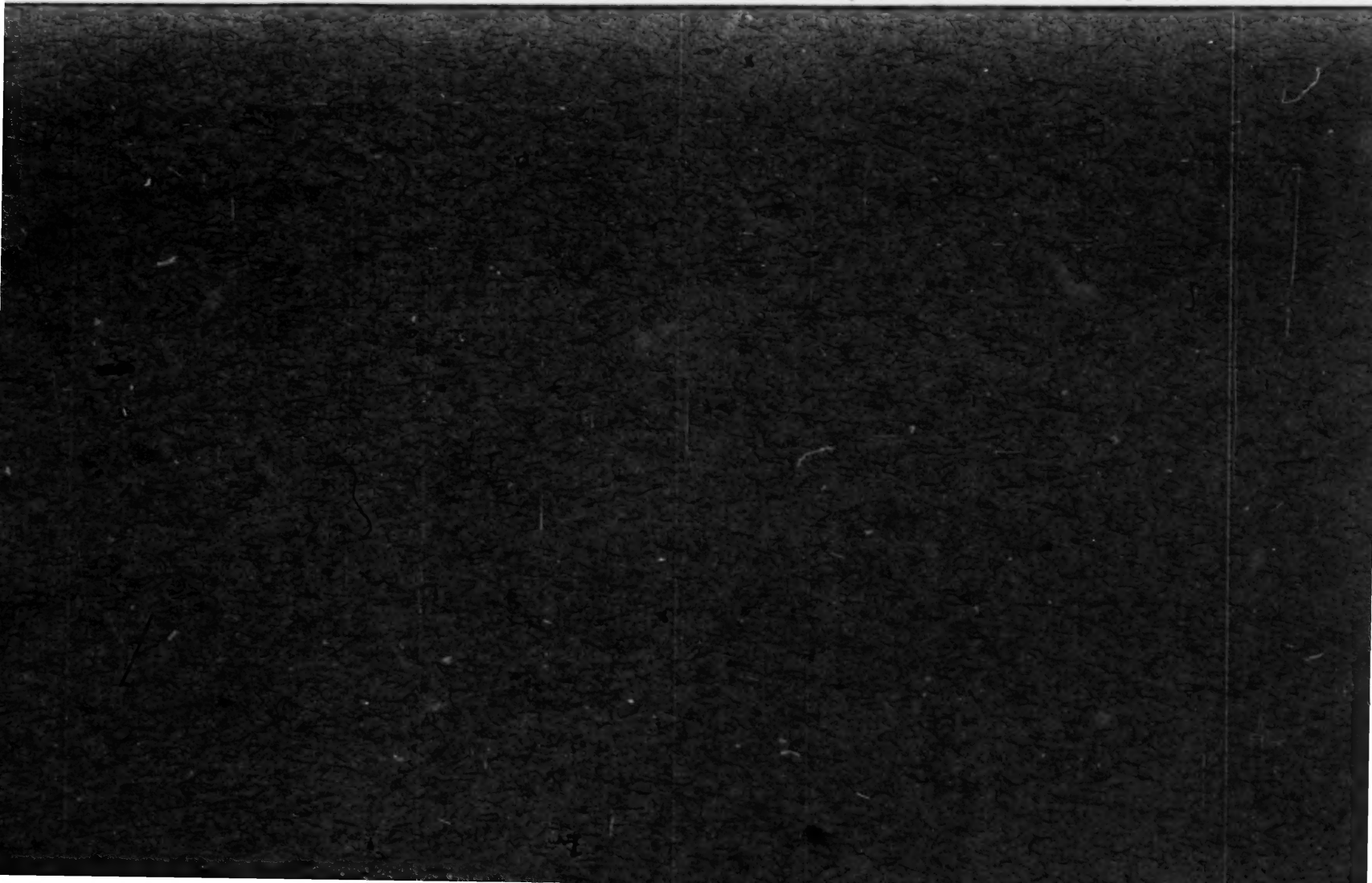
* * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *;

* * * * * * *

Sec. 10(c) * * * Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument * * *.

* * * * * * *



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# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 1025

THE LAIDLAW CORPORATION, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-47) [1] is reported at 414 F. 2d 99. The Board's decision and order (A. 23-94) are reported at 171 NLRB No. 175.

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[1] "Pet. App." refers to the appendices bound with the petition. "A." refers to the separate Appendix filed with the petition. "E." refers to those portions of the testimony and exhibits printed in the two volumes labeled Exhibits in the court below. "Tr." refers to the original transcript of the testimony.

## JURISDICTION

The judgment of the court of appeals was entered on September 25, 1969 (Pet. App. 48-49). On December 19, 1969, Mr. Justice Douglas extended the time in which to file a petition for a writ of certiorari until December 31, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Board, having found that the employer discriminated against certain striking employees in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, properly ordered the employer not only to reinstate those employees to their former jobs but also to reimburse them for their lost earnings.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 50.

## STATEMENT

### A. The Board's Findings of Fact

In June 1962, the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO, was certified as the collective bargaining representative of the Company's production and maintenance employees at its Peru, Indiana plant. Since that time the Company and the Union have been parties

to successive collective bargaining agreements, the most recent of which ran from December 14, 1964, to December 13, 1966. In the late fall of 1965, the Union notified the Company of its desire to reopen the latter contract to renegotiate wages;[2] the Company agreed, and the parties met at various times in the months of December 1965 and January 1966. The Company refused to offer any increase in wages, and, on Saturday, January 8, 1966, the employees voted to strike in support of their demand for a wage increase. (A. 25, 35-40, 51; R. 29-32.) On January 10, the Union sent the Company a telegram notifying it of the employees' decision (A. 40, 51, 85; E. 33). That day, Krile, a foreman, told Lemke, an employee, that he did not know that she belonged to the Union; Krile added that he:

> didn't think there was enough that belonged to the union that could do any good [, that] there were only four or five in his department that belonged to the union and he had orders to replace them. [A. 70-71; Tr. 277.]

On January 11, the Union sent the Company another telegram stating that the strike would begin at noon the next day (A. 41). Also on January 11, foreman Krile told employee Good that "it won't do you a damn bit of good to go [on strike] because by the very next morning every damn one of you will be replaced" (A. 71; E. 215). That afternoon, plant manager Johnston read a prepared speech to

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[2] The contract contained a provision permitting mid-term negotiations with respect to wages (A. 25).

about 75 or 80 of the Company's employees gathered in the lunch room, which included the following statements:

> The Company has decided to continue to operate through the strike, and in doing so will provide work for all employees who decide to work and will hire new employees to replace those on strike.
>
> Mr. Wentz has told those of you at the Union meeting last Saturday that our attorney Mr. Duck lied to you on last Friday when he told you that under Federal Law if you do go on strike and the Company hires a replacement for you you *Lose Forever* your right to employment by this company. I want to assure you that such *IS* the law. Mr. Duck told you the absolute truth. Let me suggest that before you take action that can seriously and permanently effect your future here, you check with any lawyer of your own choice or with the Indianapolis Office of the National Labor Relations Board. You will find Mr. Wentz has misled you and Mr. Duck has told you the absolute truth. [A. 70, 85; E. 242, emphasis in original text.]

On January 12, shortly before noon, foreman Krile told employee Miller that the employees "could be replaced," that the "Company already had applications, and had already hired [your] replacement" (A. 71; Tr. 281). At noon, approximately 70 of the Company's 99 bargaining unit employees went out on strike (A. 41, 51; E. 268). As employee Durham was leaving the Company's building to join the

strike, Buttram, another foreman, told her "the Company could afford to go into the hills and get cheap hill billies for cheap transportation and they would cross the picket lines and that we would be replace[d]"; he added, "it has been good to know you" (A. 70; E. 81).

On January 21, William Massey, a long-time employee of the Company, went out on strike and walked on the picket line with the other employees (A. 52, 85; E. 56-57). Two days later, he telephoned his supervisor, Bob Bridges, and asked to return to work (A. 52, 85; E. 57-58). Massey was told to report at 7 o'clock the next morning (A. 52; R. 58). When Massey arrived, he was told by trainee employment manager Grayson that his job, as well as the jobs of all male employees, were "filled" at that time (A. 85, 52; E. 59). Grayson added that, if the Company were to re-employ Massey it would be as a "new employee" at the minimum contract starting salary of $1.89½ per hour (A. 52, 85; E. 60-61).[3] Three days later, Grayson telephoned Massey and asked him to return to work. Grayson promised Massey the same pay he was receiving when he went on strike, but said he "would have to be reinstated as a new employee" (A. 52-53; E. 59-60). Massey refused to return to work on those conditions, and continued to picket (A. 53, 85).

During the strike, plant manager Johnson told foreman Bridges that they should replace the strikers "as fast as we can" to get rid of the employees

[3] When the strike began, Massey was earning $1.99½ per hour (A. 85, 52; E. 57, 182).

with the most seniority because they were the "troublemakers" (A. 67; Tr. 118).

On the evening of February 10, approximately 50 of the striking employees met and voted to abandon the strike and return to work (A. 85; E. 41-44). The following morning, Union representative Rains and about 40 strikers appeared at the plant; Rains made an unconditional offer to return to work on behalf of all the striking employees (A. 85; E. 45, 135-138). Additionally, each of the employees present tendered a written form letter making such an offer (A. 85, 59; E. 45, 135, 268). Following a telephone conversation with the Company's attorney, Johnston read the following statement to the gathered employees (A. 85, 59; E. 46, 136-137, 189):

> Many of you have been permanently replaced and are not entitled to reinstatement. As soon as we can determine if there are job openings today, those of you for whom there are such openings, if any, will be notified on or before Monday to report to work.

Thereafter, the Company determined that, as of February 11, all but five of the strikers had been replaced and hence only five employees were needed to bring the work force up to pre-strike levels (A. 85, 86, 64; E. 199-202). Accordingly, five of the striking employees were notified by telegram of the vacancies and offered reinstatement (E. 204).

On February 15, the Company received five additional requests for reinstatement from striking employees. Again, the Company checked its requirements and determined this time that it had nine open-

ings. It sent employment offers to all five of the strikers who had applied that day. The other four openings were "filled with new hires," whose applications the Company had "on file." (E. 206, 210.) In deciding how to fill these four openings the Company gave no consideration to the applications of the striking employees who had sought work on February 11 (A. 60, 86; E. 142-144, 183, 206). According to plant manager Johnston: "We were handling this on the basis of the dates they applied for reinstatement," and "if they didn't apply on the right day [the Company was not] going to call them the next day, so to speak" (A. 86; E. 186).[4]

On February 16, the Company received four more requests for reinstatement from strikers, but, since it had no openings at that time, made no offers of reinstatement (E. 146-147). The same day, however, the Company began mailing to the Indiana Employment Security Division printed "termination" notices, setting forth the "date of separation" of each striking employee to whom it had not offered reinstatement. Each notice stated, "This person permanently replaced while on economic strike and no job available on _____, date of application for reinstatement." Copies of these notices were also sent to each affected employee. (A. 60, 86-87; E. 190-191, 266.)

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[4] The Board found that this policy was "newly inaugurated after the strike" (A. 86). Thus, plant manager Johnston testified that, while the plant followed seniority in all departments, "we worked out the first and foremost [policy] after the walkout" (E. 186).

On February 18, the Company received three more applications for reinstatement (E. 147-148). Johnston again reviewed the Company's personnel needs for that day and determined that four jobs were available (E. 148-150). The three employees whose applications were received that day were offered reinstatement (A. 60). Again, none of the strikers whose applications for reinstatement had been received on previous days was considered for the additional vacancy. Rather, the job was filled with a new employee. (E. 150.)

During the week of February 14 to 18, the employees who were not reinstated continued to picket outside the Company's premises with signs stating that the Union was on strike (A. 60-61; E. 49-50, 55). On February 20, a group of approximately 11 employees who had been reinstated or offered reinstatement met with Union representative Rains to protest the Company's action in terminating many of the strikers and in failing to reinstate strikers despite job openings (A. 87, 61; E. 51-52). Rains told the employees that they had the right to file unfair labor practice charges, and to continue to strike. The employees decided that they would "go on strike under the sign of an unfair labor [practice] strike." (A. 87, 61; E. 52.) The next day, February 21, the picket signs were changed to read, "Local 681 International Brotherhood of Pulp and Sulphite on strike protesting unfair labor practices" (A. 71; E. 55).[5]

[5] Also on February 21, the Company received four more applications for reinstatement. The Company discovered that it had four vacancies and offered the four applicants reinstate-

After February 21, the Company continued to advertise for new employees, as it had done from the beginning of the strike. The advertisements were still running at the time of the Board hearing in April.[6] From February 12 to March 31, the Company hired about 50 new employees (A. 62, 68; E. 258-261). During that period it reinstated or offered reinstatement to only 18 strikers (A. 60, 66).

### B. The Decisions Below

The Board held, *inter alia*, that the Company violated Section 8(a)(3) and (1) of the Act by terminating the employment status of strikers whose jobs

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ment. Each, however, refused and joined in the picketing with the other employees. The Company received no more applications for reinstatement after this date (A. 60-61, 87; E. 154).

[6] The advertisements read as follows (A. 68; E. 11-12, 262):

NOTICE NOTICE

HELP WANTED

WE HAVE PERMANENT JOBS FOR ANY "MEN" OR "WOMEN" INTERESTED. HIRING WHILE JOB OPENINGS ARE AVAILABLE.

APPLY LAIDLAW CORP.
175 WASHINGTON AVE.
PERU, INDIANA
PHONE: 473-4468

OUR MANY BENEFITS INCLUDE PAID VACATIONS, HOLIDAY PAY, INSURANCE, TIME AND HALF ON SATURDAYS, AND DOUBLE TIME ON SUNDAYS.

WE PRACTICE EQUAL EMPLOYMENT OPPORTUNITY

"HAVE YOU SEEN THE PICKETS?"
WE ARE *NOT* A CLOSED SHOP.

NOTE: Unskilled Female Help 1.49½ per hour.

were held by replacements on the date they applied to return to work, instead of recalling them as vacancies arose. The Board's holding rested on alternative grounds. First, the Board found that the Company's action was motivated by animus against the strikers for their strike activity (A. 66-68, 88, 93).[7] Second, the Board held that, even absent a bad motive, the Company's action in failing to recall the strikers as vacancies arose was inherently discriminatory, that the Company lacked a substantial business justification which would privilege such discrimination, and that the Company's action was thus unlawful under the principles enunciated in *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (A. 88-93).

The Board ordered the Company to cease and desist from the unfair labor practices found, and from otherwise interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. The Board also ordered the Company, *inter alia*, to offer Massey and the 50 other strikers whose employ-

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[7] This finding was based on foreman Krile's statement to employee Lempke that he had orders to replace the union members in his department; plant manager Johnston's warning to the employees that anyone who went out on strike and was replaced would "Lose Forever [his] right to employment by this company"; Johnston's statement to foreman Bridges that they should replace the strikers "as fast as we can" to get rid of the employees with the most seniority because they were "troublemakers"; and the fact that, although there was a large turnover among the nonstrikers and strike replacements, the Company did not recall any striker who had been replaced despite his continued availability for a job, but instead hired a substantial number of unskilled new employees (A. 66-68, 87-88).

ment was terminated immediate and full reinstatement, with backpay from the dates on which the Company should have hired them as their jobs became available; to offer the reinstated employees who resumed striking on or before February 21 immediate and full reinstatement upon their unconditional offer to return to work;[8] and to post appropriate notices (A. 76-82, 93-94).

The court of appeals, with one judge dissenting, sustained the Board's findings and conclusions, and enforced its order in full (Pet. App. 1-47).

## ARGUMENT

Petitioner does not appear to challenge (see Pet. 9 n. 8, 12) the propriety of the Board's conclusion, sustained by the court of appeals, that it violated Section 8(a)(3) and (1) of the Act by terminating the employment status of striking employees merely because their jobs were filled by replacements on the precise day that they applied for reinstatement and by hiring unskilled new employees in preference to the strikers when vacancies occurred shortly thereafter. Petitioner's basic contention is that the Board's conclusion rests on principles which were first enunciated in *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375, decided after the Company's action, and that, in these circumstances,

[8] The Board found that the strike continued after February 11 due to the Company's unfair labor practice in terminating strikers, and that thus those strikers who rejected offers of reinstatement and rejoined the strike became unfair labor practice strikers on and after February 21 (A. 68, 88).

it is unfair and arbitrary to impose a backpay liability on the Company. However, it is unnecessary to reach this issue here, for the Board's unfair labor practice finding also rests on an alternative ground —that the Company was motivated by animus against the strikers. The latter ground is the classic basis for a finding of unlawful discrimination, established long before *Fleetwood;* it alone is sufficient to support the Board's backpay order.

Contrary to petitioners' argument (Pet. 12, n. 10), the Board's alternative finding that the Company's failure to reinstate strikers was discriminatorily motivated is distinct from its rationale based on *Fleetwood,* and has ample evidentiary support. As the court below noted (Pet. App. 17), statements by Company supervisors revealed that the Company had tailored its new hiring policy deliberately to eliminate the strikers. "This evidence," the court added, "when considered with the fact that not one striker who had been replaced was recalled and in light of the company's advertising for permanent unskilled help and its hiring of approximately fifty new employees to fill vacancies, is sufficient to establish a prima facie showing of unlawful motive," which the Company failed to rebut (Pet. App. 17-18).

But, even if the Board's backpay order here could only be sustained on the new *Fleetwood* rationale, it does not follow that such an order was improper. As the court below pointed out (Pet. App. 19), "retroactivity 'must be balanced against the mischief of producing a result that is contrary to a statutory design [or] to legal and equitable principles,' " quoting

from *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203. In this case, the court concluded, "the importance of protecting the statutory rights of Laidlaw's employees outweighs the fact that the company may have relied on a prior Board rule or policy" (*ibid.*). Cf. *National Labor Relations Board* v. *Rutter-Rex Mfg. Co.*, No. 32, O.T. 1969, decided December 15, 1969, sl. op., pp. 6-7.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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